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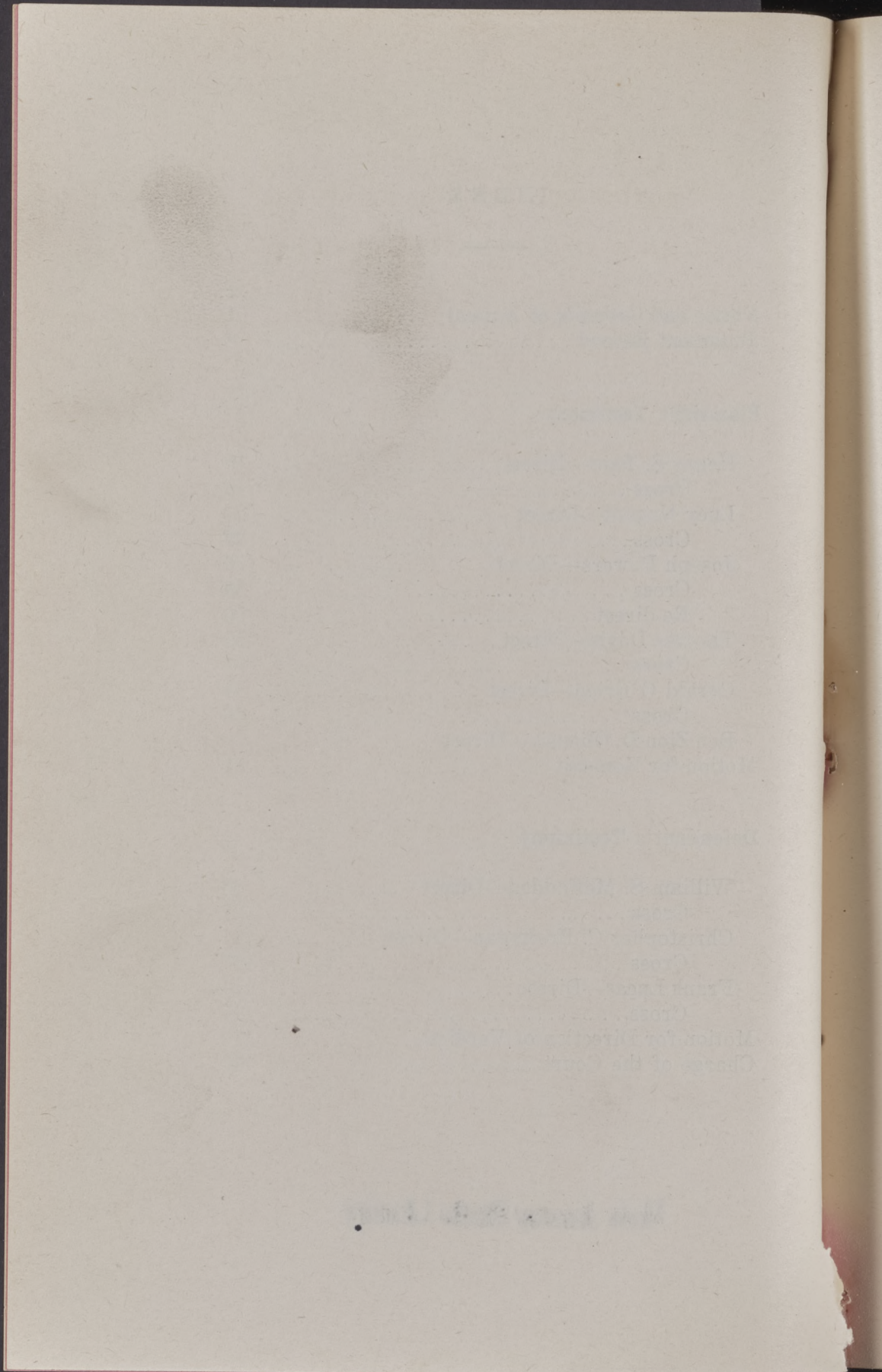
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NOTICE AND GROUNDS OF APPEAL.

NEW JERSEY SUPREME COURT.

JOEL W. FITHIAN, Adminis-
trator of PHILIP NU-
GENT, Deceased,

*Plaintiff &
Defendant-in-Error,*

vs.

PENNSYLVANIA R A I L R O A D
C O M P A N Y,

*Defendant &
Plaintiff-in-Error.*

NOTICE AND GROUNDS

OF APPEAL.

10

20

To Joseph C. Haines, Esquire,
Attorney of Plaintiff & Defendant-in-Error:

Take Notice that the defendant, Pennsylvania Railroad Company, appeals to the Court of Errors and Appeals of New Jersey from the whole of the judgment entered in this cause on the following grounds:

1. That the trial Judge admitted incompetent evi- 30
dence as follows:

“Q. Did you get any instructions from the foreman about the movement of trains under that bridge while you were working there?”

Mr. Logan Gaskill: I object to that as incompetent, immaterial, irrelevant and not binding upon this defendant.

The Court: That is true, unless it is brought home to them, but in view of counsel's opening, I can not assume that it will not be shown.

Mr. Logan Gaskill: Your Honor will give me an exception?

The Court: Note an exception; I understand it is intended to be followed up by proof that the practice to which this witness is about to refer was acted upon by the railroad?

10 Mr. Wescott: Yes.

A. Yes.

Q. Now, what were those instructions?

A. Well, the instructions was—the foreman told us that all trains should drift through under the bridge while the men was working there.”

2. That the trial Judge admitted incompetent evidence as follows:

20 “Q. Did you get any instructions from the foreman about how the trains should go under that bridge while you were working there?

(Objected to as incompetent, irrelevant and immaterial.)

A. Yes.

Q. What were they?

(Objected to.)

The Court: The objection is overruled.

(Exception noted for the defendant.)”

30 3. That the trial Judge admitted incompetent evidence as follows:

“Q. What instructions did you get?

Mr. Gaskill: I object to that for the same reason and ask an exception.

(Exception noted.)

A. We got instructions that all trains should drift through this bridge in working hours.”

4. That the trial Judge admitted incompetent evidence as follows:

“Q. What is the rule in Pennsylvania with reference to the duty of railroad companies to persons who are permissibly on or near the tracks or premises of such companies?

Mr. Joseph Gaskill: We make the same objection as before and the further objection that this is not the best proof as to the rule. If it has been the subject-matter of decision in the state of Pennsylvania, the decisions certainly show the rule. 10

(Objection made and exception noted.)

The previous question and objection were:

Q. What is the rule in Pennsylvania with reference to a person who is permissibly crossing railroad tracks —

Mr. Logan Gaskill: I object to that as incompetent, irrelevant and immaterial, and also because it involves a disputed question, that of one permissibly crossing railroad tracks.” 20

5. That the trial Judge admitted incompetent evidence as follows:

“Mr. Wescott: Now, there is one other question I want to ask this gentleman in relation to the duty of the railroad company to an employee of one of its contractors on or near its right of way.

Q. What is the rule in Pennsylvania? 30

Mr. Joseph Gaskill: We make the same objection as heretofore.

The Court: Note the objection and an exception to it.

A. That is laid down in the same case that I referred to.

Q. The same case you referred to?

A. Yes."

6. That the trial Judge admitted incompetent evidence as follows:

"The Court: Well, what is the rule?

10 The Witness: The rule is that the railroad must exercise reasonable care under the circumstances, in view of the fact that the employee of the contractor has to work on or near the tracks.

Mr. Joseph Gaskill: I move to strike out that answer, if the Court please, as being irrelevant, immaterial and incompetent.

The Court: The motion is overruled and an exception noted."

7. That the trial Judge admitted incompetent evidence as follows:

20 "Q. What is the legal presumption in Pennsylvania where a man has been crossing the tracks of the company or where a person is killed while crossing the tracks of the railroad company, with reference to his exercise of care?

Mr. Joseph Gaskill: I make the same objection, if the Court please, on the same grounds.

The Court: The objection is overruled and an exception noted.

30 A. When a man is crossing the track and has been killed, the presumption is that he has exercised all the care requisite under the circumstances, that is, that he has stopped, looked and listened, which is the summing up of the rule in Pennsylvania."

8. Because the trial Judge refused to non-suit the plaintiff on motion of the defendant, as follows:

“Mr. Logan Gaskill: If the Court please, we move for a non-suit in this case on the ground that the decedent, Nugent, had assumed the risks incident to his employment, and that his death on this morning came by one of the risks which he had assumed; that he was guilty of contributory negligence under the testimony in the case, because he walked up, under their testimony, along the side of the track and crossed over the tracks, and he is not excused by the fact that he is said to have looked and listened, because he could have gone up the bank on the right side, the side he was on; and he is not excused because he and the other men had not made a path for themselves up that bank.

* * * * *

The Court: I think you will find this case I have referred to has a very close analogy to the case on trial. I do not think I can rule it as a question of law. I will deny the motion and note an exception.”

9. Because the trial Judge refused to withdraw a juror on the following motion:

“Mr. Joseph Gaskill: If the Court please, I desire to make another motion, and that is that your Honor shall withdraw a juror on the ground that the opening stated that the instructions which were given by the foreman to the men would be traced directly to the railroad. Your Honor overruled our objection on the statement of counsel that they would connect it with the railroad company, and again when the testimony was introduced objection was again

made and your Honor again asked the question and you were again informed that it would be traced to the railroad company. Our point is that not having done that, that the defendant in this case is prejudiced by reason of the fact that that testimony is in before the jury and under a promise that it would be connected with the railroad company, and it seems to me that in justice to the defendant, a juror should be withdrawn.

10

The Court: Why do you say it has not been connected?

Mr. Gaskill: They have not proven that the railroad company gave any such rule as that or any such instruction.

The Court: No, but there is proof that they observed it."

10. Because the trial Judge refused to direct a
20 verdict for the defendant.

"Mr. Logan Gaskill: I renew my motion and ask for a direction of a verdict for the defendant on the grounds that there is no negligence on the part of the defendant, and contributory negligence on the part of the decedent, and that he assumed the risk of this accident.

The Court: The motion will be denied and an exception noted.

(Exception noted for the defendant.)"

30

11. Because the trial Judge improperly charged the jury as follows:

"There is testimony in the case that when an employee working lawfully on a railroad in the performance of his duties is required to be in a position of danger with respect to moving trains,

that there the railroad company owes him a duty of reasonable care to avoid injury to him; and it is claimed in this case on behalf of the plaintiff that there was adopted a custom or rule for the guidance of those in charge of the trains upon this occasion, that they should let their engines drift as they approached this bridge. Various reasons have been given for that practice, and it further has been testified in the case that the deceased knew of this rule.

10

I say, the defendant's answer to all this is that there was no violation of any duty, and secondly, that the plaintiff heedlessly walked into this train without paying any regard to his own safety."

GASKILL & GASKILL,
Attorneys of Appellant.

20

[ENDORSED]

Due and legal service of within notice and grounds of appeal acknowledged.

Joseph C. Haines,
Atty. of Plaintiff.

Feb. 14th, 1917.

Filed Feb. 17, 1917.

30

Wm. C. Gebhardt,
Clerk.

JUDGMENT RECORD.

SUPREME COURT OF NEW JERSEY.
CAMDEN COUNTY.

10	JOEL W. FITHIAN, Adminis- trator of the Estate of PHILIP NUGENT, De- ceased, vs. THE PENNSYLVANIA RAIL- ROAD COMPANY.	}	JUDGMENT RECORD. ACTION AT LAW. ON POSTEA. JOSEPH C. HAINES, HENRY L. BARROWAY, <i>Attorneys.</i>
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20 The Pennsylvania Railroad Company, the defend-
ant in this cause, was summoned to answer unto
Joel W. Fithian, administrator of the estate of Philip
Nugent, deceased, the plaintiff therein, in an action
at law upon the following complaint:

(Summons issued October 5, 1915)

Plaintiff, Joel W. Fithian, of No. 608 Broadway,
Camden, New Jersey, administrator of the estate
of Philip Nugent, deceased, says:

30 1. That George Gibbs and Ernest R. Hill, part-
ners, trading as Gibbs and Hill, were on or about
the 6th day of April, 1915, engaged in erecting for
defendant, The Pennsylvania Railroad Company,
and at defendant's request, certain overhead wiring
for the conduct of electric current over and parallel
with certain of the tracks of the said defendant at or
near the station of said defendant at Paoli, state of
Pennsylvania.

2. That said George Gibbs and Ernest R. Hill, partners, trading as Gibbs and Hill, had in their employ, as an iron worker, on or about the 6th day of April, 1915, one Philip Nugent, who was on said day and while so employed, engaged in the work of erecting said overhead wiring at or near said Paoli Station.

3. That in the performance of the duties of his employment, it was necessary for the said Philip Nugent, along with the other workmen in the employ of said George Gibbs and Ernest R. Hill, trading as Gibbs and Hill, and at work at said place, to frequently cross over and walk along the tracks of the defendant at or near said place of work. 10

4. That it was the duty of the defendant, by its servants, to give the said Philip Nugent, along with the other employees of George Gibbs and Ernest R. Hill, trading as Gibbs and Hill, at work as aforesaid, adequate warning of the approach of trains passing along the tracks of defendant at said place of work. 20

5. That said defendant, by its servants, caused a certain passenger train to approach said place of employment of the said Philip Nugent on or about the 6th day of April, 1915, at or near the hour of 8 o'clock in the forenoon, over the tracks of the defendant; that said defendant negligently failed to give any signal of the approach of said train by ringing a bell or blowing a whistle or by giving sufficient warning of said approach in any other manner, or to reduce the speed of said train as it approached said place where the said Philip Nugent was engaged at work as aforesaid. 30

6. That because of said negligent omission said train collided with the said Philip Nugent, who was then and there lawfully upon the tracks of the defendant, whereby the said Philip Nugent was so severely injured that he was rendered insensible and afterwards, to wit, on April 6th, 1915, and within 12 calendar months of the commencement of this action died from the effects of said injury.

10 7. On October 5, 1915, the surrogate of Camden County granted letters of administration upon the estate of said Philip Nugent to the plaintiff, who accepted same.

8. Said decedent left surviving him a widow and 3 infant children who are his only next of kin; all of whom were dependent upon decedent for their support and who have, by his death, suffered great pecuniary injury.

20 Plaintiff, as administrator as aforesaid, demands \$20,000 damages.

JOSEPH C. HAINES,
HENRY L. BARROWAY,
Attorneys for Plaintiff.

(Filed Oct. 11, 1915.)

30 The defendant, Pennsylvania Railroad Company, a corporation of Pennsylvania with offices in the city of Camden, and elsewhere, answering says:

1. It admits the matters stated in the first paragraph of the complaint.

2. It is not informed as to the matters stated in the second paragraph of the complaint and leaves the plaintiff to his proof.

3. It is not informed as to the matters stated in the third paragraph of the complaint and leaves the plaintiff to his proof.

4. It denies the allegations stated in the fourth paragraph of the complaint. 10

5. It denies the matters stated in the fifth paragraph of the complaint, except the striking of the said Philip Nugent by a passenger train on or about the time stated.

6. It denies there was negligent omission whereby said train collided with Philip Nugent and denies that he was then and there lawfully on the tracks of the defendant but admits his injury and death by colliding with said train. 20

7. It is not informed as to the matter stated in the seventh paragraph of the complaint.

8. It is not informed as to the matter stated in the eighth paragraph of the complaint.

GROUND^S OF DEFENSE.

30

First Ground of Defense: That there was no negligence on the part of the defendant, its servants, agents or employees.

Second Ground of Defense: That there was contributory negligence on the part of the plaintiff's

intestate by walking upon and over the railroad tracks of the defendant without looking and listening for the approach of trains.

Third Ground of Defense: That the said Philip Nugent was a trespasser upon the railroad tracks of said defendant at the time of his injury and death.

10

GASKILL & GASKILL,
Attorneys of Defendant.

(Filed Nov. 5, 1915.)

(1) Plaintiff denies that there was no negligence on the part of defendant, its servants, agents, or employees as alleged in paragraph headed "First Ground of Defense" of defendant's answer.

20 (2) Plaintiff denies that there was contributory negligence on the part of plaintiff's intestate by walking upon and over the railroad tracks of the defendant without looking and listening for the approach of trains as alleged in paragraph entitled "Second Ground of Defense" of defendant's answer.

30 (3) Plaintiff denies that said Philip Nugent was a trespasser upon the railroad tracks of said defendant at the time of his injury and death as alleged in paragraph entitled "Third Ground of Defense" of defendant's answer.

JOSEPH C. HAINES,
HENRY L. BARROWAY,
Attorneys of Plaintiff.

(Filed Nov. 6, 1915.)

This case was tried before Judge Frank T. Lloyd, with a jury, at the Camden Circuit, on December 19, 1916.

The jury rendered a general verdict against the defendant and in favor of the plaintiff for five thousand dollars (\$5,000.00).

Whereupon it is adjudged that the plaintiff recover of the defendant, the sum of five thousand

Damages	\$5,000.00	dollars damages, and his costs,
Costs	48.02	which are taxed at the sum of
		forty-eight dollars and two
		cents, making in the whole the
	\$5,048.02	sum of five thousand, forty-
		eight dollars and two cents.

(Judgment entered December 23, 1916.)

WM. S. GUMMERE,
C. J.

20

I, William C. Gebhardt, clerk of the Supreme Court of the state of New Jersey, do certify that the foregoing is a true copy of the notice of appeal and also a copy of the judgment entered in the above-stated cause as the same remains on file and of record in my office.

In testimony whereof I have set my hand and the seal of said court at Trenton, this nineteenth day of February, A. D. nineteen hundred and seventeen.

WM. C. GEBHARDT,
Clerk.

TESTIMONY. ..

NEW JERSEY SUPREME COURT.

10	JOEL W. FITHIAN, Adminis- trator, &c., vs. PENNSYLVANIA R A I L R O A D COMPANY.	}	ACTION AT LAW.
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Camden, New Jersey, December 19, 1916.

20

APPEARANCES:

For the plaintiff: J. C. HAINES, ESQ., JOHN W.
 WESCOTT, ESQ., H. L. BARROWAY, ESQ.
 For the defendant: GASKILL & GASKILL, ESQS.

Before LLOYD, J., and a jury.

30

THE CASE FOR THE PLAINTIFF.

(Mr. Haines opens the case for the plaintiff to the jury.)

(Mr. Logan Gaskill opens the case for the defendant to the jury.)

Mr. Haines: The grant of letters is admitted and we offer the letters in evidence and ask to have them marked.

(Letters of administration marked Exhibit P1.)

HENRY S. TARR, SWORN.

10

By Mr. Wescott:

Q. Where do you live, Mr. Tarr?

A. 1619 Columbia Avenue, Philadelphia.

Q. Your business is what?

A. Commercial photographer.

Q. I show you a couple of photographs and ask you if you made them?

A. I did, sir.

20

Q. When?

A. September 27, 1916.

Q. And where did you have your machine when you made those pictures?

A. On the south of the Pennsylvania Railroad there or west of the Berwyn station on this picture, and this from the platform of the southbound train—would you call that a southbound or an eastbound train? This is the platform here of the station.

Q. Well, they were both in what direction from the bridge, the overhead bridge? 30

A. South or east of the bridge—which is it, south or east? I don't know the points of the compass.

Mr. Joseph Gaskill: Well, with reference to Berwyn station?

The Witness: Right at Berwyn station on the in-bound side of the station.

Q. Does Berwyn station appear in this picture?

A. No, sir, only the platform in one of them.

Q. Take the picture that does not show the station; where was your machine located in that?

A. About this point, about a hundred yards from the station platform toward the bridge.

10 Q. About a hundred yards from the station platform and toward the bridge?

A. Yes.

Q. I will make a mark on that; about there, where I made that round ring?

A. Yes.

Mr. Wescott: Call that number 1.

(Said photograph is marked Exhibit P2.)

20 Q. Now, picture No. 2 shows the tool house but not the station—the station is still further south or whatever the point of the compass is, from the tool house?

A. That is the tool house (indicating).

(Said photograph is marked Exhibit P3.)

30 Q. And both pictures show the bridge and tracks and banks on the side and the curve beyond and coming under the bridge?

A. Yes.

Q. In other words these pictures with substantial accuracy portray the physical conditions there?

A. Exactly.

Mr. Wescott: I offer them in evidence.

Q. Did you make any measurements while you were there?

A. Yes, sir.

Q. Now, what were they, please?

A. There was about 117 paces from the signal post to the bridge; at least, I made the picture alongside of the signal post. There is the signal post down there on that Exhibit P2, did you say, or Exhibit P1, 10 this one right down here; there is the signal post. Now, it is 117 paces from this point to the bridge or approximately a hundred and some odd yards.

Q. Did you pace or estimate the distance —

A. Paced.

Q. Listen, did you pace or estimate the distance from the tool house to the bridge?

A. Not from the tool house, no; from a point opposite the tool house, or in other words, from this post in here. 20

Q. Did you pace or estimate the distance from the tool house to where the engine is supposed to have crossed the track?

A. Not from the toll house, no.

Q. Well, from a point opposite the tool house?

A. Yes, from a point opposite the tool house.

Q. How far was that?

A. That was 117 paces.

Q. Did you pace or estimate the distance from the point where Nugent is supposed to have crossed the track to the bridge? 30

A. Yes, that was—from the first pole south of the bridge—I believe that was the point of the accident—that is forty paces.

Q. From the bridge?

A. From the bridge, south of the bridge.

Mr. Wescott: Are those all the measurements you want attention called to, Mr. Haines?

Mr. Haines: Yes.

Cross-examination.

By Mr. Logan Gaskill:

10 Q. Mr. Tarr, who told you the place where the accident is supposed to have occurred?

A. Counsel.

Q. Mr. Haines?

A. Yes.

Q. And where did he tell you that it occurred?

A. About forty paces south of this bridge.

Q. About forty paces south of the bridge?

A. Yes, or right opposite the first pole, I believe, south of the bridge.

20

The Court: What is the direction? You speak of east and west and then north and south; what is the direction of the road?

The Witness: I guess it is east and west, your Honor; east of the bridge.

Q. Now, with respect to Philadelphia, a passenger train coming into Berwyn, would that go to or from

30 Philadelphia?

A. A train coming to Berwyn, after leaving Berwyn would come into Philadelphia.

Q. From Berwyn?

A. Yes.

By the Court:

Q. It would depend on which side it left it, wouldn't it?

A. On this side the train would be going toward Philadelphia, on the south side of the station.

Q. Do you know whether or not this is what they call No. 1 track?

A. I don't know it by that designation.

Q. Is the bridge on the Philadelphia side or the 10 other side of Berwyn, the bridge?

A. The upper side, toward Paoli.

Q. Away from Philadelphia?

A. Away from Philadelphia, yes; in other words, west of Berwyn Station.

By Mr. Logan Gaskill:

Q. Now, when you speak of the bridge, you mean the signal bridge? 20

A. No.

Q. Or do you mean the highway bridge?

A. The bridge where the men were working, as I understood it.

Q. You understand the men were working on the highway bridge or the signal bridge?

A. No, on this highway bridge.

Q. When you speak of the signal post, you mean the post here that carries these wires?

A. The one that carries this signal. 30

The Court: Is that right, Mr. Gaskill—was it the highway bridge?

Mr. Logan Gaskill: I don't know; I want to find out. I would imagine it was, your Honor.

The Court: We don't want confusion right at the start, you know. Mr. Haines, which was it?

Mr. Haines: I didn't hear the question.

The Court: Was it the signal bridge or the highway bridge these men were working on?

Mr. Haines: The highway bridge.

10

Q. Then the 117 paces you took from the signal post was from this signal bridge down here to this highway bridge?

A. Yes, sir.

Q. Now, these pictures show a curve in the track beyond the bridge, don't they?

A. Yes, sir.

Q. Did you pace off how far it was from that highway bridge to the sharp elbow in that curve?

20 A. No, we paced it off about eighty-five paces between each pole, and I believe this takes you over five poles to the furthest point of vision on this curve.

Q. You paced eighty-five paces between these poles along the track?

A. Yes.

Q. And there are about five poles?

A. Yes, in the line of vision.

30 Q. How far did this pathway that is shown from the Berwyn platform, and the brick walk, which is shown up here to the signal bridge or highway bridge—how far does that extend beyond that bridge up around that curve?

A. That I couldn't tell you, I don't know exactly. I judge this is not a pathway; it is just simply a trench at the side of the railroad.

- Q. Well, it is flattened out by walking, is it?
A. No, I would presume this was a drainage ditch, and I presume that runs all along the line.
Q. It lies below this bank of broken stone on which the tracks are laid?
A. Oh, yes, certainly.

LUCY NUGENT, SWORN.

10

By Mr. Wescott:

- Q. Where do you live?
A. 1107 Emma Street.
Q. Where?
A. 1107 Emma Street.
Q. Where is that street?
A. It is down in South Camden.
Q. Oh, you live in Camden? 20
A. Yes.
Q. Your husband's name was what?
A. Philip Nugent.
Q. And he is the gentleman who was killed in this accident that we have been talking about?
A. Yes.
Q. How old was he when he was killed?
A. He was thirty-two when he was killed.
Q. Thirty-two?
A. Yes. 30
Q. Now, what kind of health had he had while you knew him?
A. He had good health, he was never sick.
Q. How big a man was he?
A. Well, he wasn't a big man, but he was stout.
Q. Do you know about what he weighed?
A. No, I don't know what he did weigh.

- Q. But he was a stout, healthy man?
 A. Yes.
- Q. And had he a trade?
 A. Yes, he was an iron worker.
- Q. What was his business?
 A. He was an iron worker; he was constructing iron.
- Q. How long had he been an iron worker?
 A. Well, he had been since we were married, I
 10 don't know how long before.
- Q. And you had been married how long?
 A. About nine years we had been married when he got killed.
- Q. What kind of habits had your man, your husband, rather, about drinking and smoking?
 A. He did not smoke at all; I don't know that he drank; I never seen him drunk.
- Q. Never saw him drink?
 A. No, never.
- 20 Q. You never saw him drink nor he didn't smoke?
 A. No, he didn't smoke.
- Q. Did he attend to business?
 A. Yes.
- Q. An industrious man?
 A. He was an industrious man, always attended to his work; he never lost work; I never knew him to lose a day's work since we have been married.
- Q. How much did he make?
 A. Well, he was making \$3.50 a day when he got
 30 killed, but he did make more than that.
- Q. How much more?
 A. He used to make \$4, sometimes when he was at work, \$4.50, but just when he got killed he was only making \$3.50.
- Q. Sometimes he made \$4 and \$4.50?
 A. Yes, sometimes he made \$4 and \$4.50.

Q. Did he leave any children?

A. He left three children.

Q. Are they in the court room?

A. Yes, sir, right here in the court room.

Q. Are they boys or girls?

A. Why, the youngest is a boy; he was just twenty months old when his father got killed.

Q. Twenty months?

A. Twenty months he was.

Q. And the other two are girls?

10

A. Yes.

Q. How old are they?

A. Hazel, well, she is seven; she will be eight years old in June, the 24th of June she will be eight years old.

Q. And the other?

A. And Beatrice, she will be five in June, the 13th, she will be five, and Burnett, the baby, he will be four; he is a boy.

Q. That is all the children you had, three?

20

A. That is all, just the three.

Q. Did your husband live in Camden or did you live in Camden at the time he was killed?

A. Yes, we always lived in Camden, since we have been married and before.

Cross-examination.

By Mr. Logan Gaskill:

30

Q. You say you had been married nine years, Madam?

A. I was married nine years when my husband got killed, going on ten years.

Q. And you had always lived in Camden?

A. We had always lived in Camden, been always living here in Camden.

Q. How long had he been working for Gibbs and Hill?

A. Well, he had been working—I couldn't just tell you how long it was, but he had been working all the winter; I couldn't tell you how long it was.

Q. I would like to find out how long he had been working for Gibbs & Hill, the people he was working for at the time he was killed?

A. I just couldn't tell you that; he had been working from the first time that job was started up until he got killed.

Q. Do you know whether he had been working on that job as long as three weeks?

A. Oh, he had been working all winter, ever since the first time it started. He was working on that bridge three weeks when he got killed.

Q. Do you know who he worked for before he worked for Gibbs & Hill?

A. Well, he worked for the Pennsylvania Railroad before he worked for Gibbs & Hill—what is the foreman there? L. Hartman—but the job got through and he went out of business later, and when the job was finished, then he went to work for Gibbs & Hill, but he had been working for the Pennsylvania Railroad, I guess this last four or five years or longer.

Q. What branch of work for the railroad did he do?

A. There at Broad Street station, at North Broad Street station.

30 Q. He worked out at North Broad Street station?

A. Yes.

Q. What did he do out there?

A. Well, I just couldn't tell you.

By the Court:

Q. Was it his trade, Madam, he was working at, iron work or something else?

A. He was working at that bridge, at that station out there.

Q. Well, was he doing iron work, the same—

A. No, he was doing carpenter work out there; carpenter work he did out there.

10

By Mr. Logan Gaskill:

Q. Do you know who he worked for before that job for the railroad company out at North Broad Street station?

A. Why, I really couldn't tell you.

Q. Now, you told us that he was thirty-two years old?

A. Yes.

Q. How do you know that he was thirty-two years old?

A. How do I know it?

Q. Yes.

A. I know his age; I know how old he was.

Q. Who told you how old he was?

A. Why, I always heard my husband say how old he was.

Q. Yes, you heard him say it; what was his birthday?

A. Why, I didn't ask him that.

Q. You know when his birthday was, don't you?

A. No, I don't know when his birthday was.

Q. Do you know whether it was in the winter or summer?

A. I really couldn't tell you that, for I don't know. We never celebrated his birthday, so—

30

JOSEPH POWERS, SWORN.

By Mr. Wescott:

Q. Mr. Powers, where do you live, please?

A. Well, I live in Camden.

Q. Did you know Nugent?

A. Yes, known him for about three years.

10 Q. Were you engaged on this bridge with him when he got killed?

A. Yes.

Q. Was Powers a good or poor mechanic—Nugent, I mean?

A. Well, he was an all-around man, that is what he was, in iron work and machinery work, anything like that.

Q. A good man or bad man?

A. A good man.

20 Q. A healthy looking man, strong?

A. Yes, but he wasn't a big man, a fair-sized man.

Q. A healthy looking man, was he?

A. Yes, sir.

Q. Now, how long had you and he been working on this bridge, about, before the accident?

A. Well, we were working there—I was working on this bridge about two weeks.

Q. And was he working there when you began?

30 A. Yes.

Q. And worked there all the time?

A. Yes.

Q. Who was the foreman?

A. Why, the foreman,—I couldn't tell you.

The Court: Well, if he doesn't remember the name—

The Witness: I couldn't tell you the foreman's name; I work for so many different foremen.

Q. If you can't recall his name, it is all right. Did you get any instructions from the foreman about the movement of trains under that bridge while you were working there?

Mr. Logan Gaskill: I object to that as incompetent, immaterial, irrelevant and not binding upon this defendant. 10

The Court: That is true, unless it is brought home to them, but in view of counsel's opening, I can not assume that it will not be shown.

Mr. Logan Gaskill: Your Honor will give me an exception?

The Court: Note an exception; I understand it is intended to be followed up by proof that the practice to which this witness is about to refer was acted upon by the railroad. 20

Mr. Wescott: Yes.

(Question repeated.)

A. Yes.

Q. Now, what were those instructions?

A. Well, the instructions was—the foreman told us that all trains should drift through under the bridge while the men was working there. 30

Q. Why were they drifted through while the men were working there?

(Objected to as incompetent, irrelevant and immaterial.)

The Court: I don't suppose he can tell that; they must speak for themselves on that.

Mr. Wescott: There must have been a reason for it.

10 The Court: I have no doubt, but I do not suppose this witness knows. He can only tell us the conditions there and then we can infer the reason.

Q. Did he tell all you people that?

(Objected to.)

A. Yes.

20 Mr. Gaskill: I object to that, unless——

Q. Including Nugent?

Mr. Gaskill: I object unless he was present.

The Court: Did you hear it?

The Witness: Yes, I heard it.

30 Q. And was Nugent there?

A. Yes.

Q. Now, after you got these instructions and began to work, did the trains or not drift under that bridge?

A. Well, they used to drift.

Q. They used to drift?

A. Yes, pretty near all of them used to drift through.

Q. Do you remember whether Nugent was a little late that morning?

A. Yes, he was; he came on the train behind us.

Q. Where did you keep your tools?

A. We kept our tools on the platform, on the north side.

Q. In the tool house?

A. Just on the platform in the tool box.

Q. In the tool box?

A. Yes.

10

By the Court:

Q. That is, at the station—kept under the platform at the station?

A. On the platform in the tool box; the tool box is up on the platform.

Q. At the station?

A. At the station.

20

By Mr. Wescott:

Q. Just look at picture No. 3 and see if you see the tool house there?

A. There is our tool box back there, right back of that house. (Indicating.)

Q. Right back in the corner?

A. Yes, it wasn't the station, it was a freight house.

Q. A little freight house?

30

A. Yes.

Q. And the station is back of that a little?

A. Yes.

Q. Now, where did you first see Nugent that morning?

A. Well, the first time I saw him when he left the

tool box and walked up on that side, as he left the tool box. He didn't go on the track.

Q. Was there a path on which to walk?

A. What?

Q. Was there a path on which to walk?

A. Well, the platform, you know, only so far, and there was a path walking right on the ditch, see?

Q. He was not walking on the tracks?

A. No, no.

10 Q. Now, you saw him get his tools; he had what?

A. His overalls; he walked up on the platform and when he got off of the platform, then he walked up in the ditch up to where this tower is at. Now, the towers were there then.

Q. What is it?

A. A signal tower.

Q. Is that on the picture?

A. Yes, on this here one.

20 The Court: This, you mean? (Indicating on photograph.)

The Witness: Yes, the signal tower there.

Q. Well, about how far is that signal tower from the bridge, have you any idea—what is your best judgment?

A. I guess about—probably about 120 yards, as a guess.

30 Q. When he got to the signal—

A. He went further than the signal tower.

Q. He went further toward the bridge?

A. Yes, he went right straight across the track; I saw him when he stood in the ditch and looked both ways on the track and started and crossed over. Well, he crossed the two tracks and he looked both

ways again, saw the freight was coming and he saw he had lots of time to cross——

Mr. Logan Gaskill: I object to that statement, that he saw he had lots of time to cross; that is a conclusion.

The Court: Strike that out.

Q. Well, he looked, did he, before he started to 10 cross?

A. Yes.

Q. He stopped and looked the second time before he started across?

A. Yes.

Q. That is, before he started crossing the fourth track?

A. Yes.

Q. Is there a curve there?

A. Yes, there is a curve on the other side of the 20 bridge.

Q. How much of a curve is that?

A. I couldn't say.

Q. Is it what we call a sharp curve?

A. Well, it was a pretty good curve all right.

By the Court:

Q. Could you see trains coming?

A. Yes.

Q. Could you see the trains coming beyond it? 30

A. Yes, well, you could.

Q. What?

A. Yes, you could see.

Q. Well, if you were in between the signal tower and the bridge, could you see trains coming the other side of the curve?

A. The other side of the curve? No.

By Mr. Wescott:

Q. Now, when he stopped there in the ditch the first time, was there any train moving?

A. No, not as I could see.

Q. You didn't see any train on either of these tracks, eh?

A. No, sir.

Q. Are you sure of that?

10 A. Yes.

Q. Was there a freight train there?

A. Yes, a freight train; she was away on the other side of the bridge, but none on this track that he was going to cross then.

Q. I know; then there was a freight train?

A. Yes.

Q. On which track was that?

The Court: The station side or the other—the side
20 where this tool house was or the other?

The Witness: On the other side.

Q. The freight was on the other side?

A. Yes, you know——

Mr. Logan Gaskill: It must have been on one of the middle tracks.

30 Mr. Wescott: I know; let's don't get mixed.

Q. This freight train when it went by the tool house, was it on the track nearest to the tool house or away over on the other side? There are four tracks there, aren't there?

A. Yes, I know.

Q. Which track was this freight train on?

A. It was right on the third track, I guess.

By the Court:

Q. You mean the third track from the tool house?

A. Yes.

By Mr. Wescott:

Q. The third track from the tool house?

A. Yes.

Q. Very well; now, was that a long freight train? 10

A. Yes, it was quite a long train.

Q. Made up of box cars in part?

A. Yes.

Q. Now, how far do you judge that freight train had got by Nugent when he started to go over? Oh, yes, it was coming toward him; now, this freight train—I got a little mixed myself about that, or at least I misunderstood—the freight train was going which way or coming which way?

A. Coming the same way as the local was coming. 20

By the Court:

Q. You mean they were both coming toward the station?

A. Yes.

By Mr. Wescott:

Q. That is, they were both coming toward Nugent? 30

A. Yes.

Q. Now, when Nugent started to go across in front of this freight train, about how far was the freight train from him?

A. I guess it was about—it had not come to the bridge yet.

By the Court:

Q. You mean now which bridge, the road bridge?

A. The bridge we were working on.

Q. How near had he gotten to it?

A. To the bridge?

Q. Yes.

A. I guess about fifty yards.

10 By Mr. Wescott:

Q. How fast was that freight train going, about?

A. I guess between fifteen and twenty miles, as near as I can tell.

Q. Where Mr. Nugent stood when he looked the second time, could he see the passenger train?

A. No.

Q. Why not?

A. The freight hid it, shut it off from his view.

20 Q. On account of the curve and freight train?

Mr. Logan Gaskill: I object to that as leading and suggestive; the witness has said it was the freight train.

The Court: Yes.

Mr. Wescott: Well, he has already said there was a curve there; it is harmless.

30

Q. Was the freight train on the curve?

Mr. Logan Gaskill: I object; I think this is very critical and I think the leading questions should be stopped.

The Court: Yes, the questions should not be leading, of course, at this point. Tell us what obstructed his view when he looked the second time. You said he couldn't see the passenger train—why not?

The Witness: The local shut off his view from it.

By the Court:

Q. When you say "the local," what do you mean 10
by "the local"?

A. The passenger train.

Q. No, I am talking about the passenger train;
that is the one that hit him, wasn't it?

A. No, it was the freight train that hit him.

Q. Oh, it was?

A. Yes.

The Court: Well, that is a different story.

20

By Mr. Wescott:

Q. Don't let yourself get confused about this. Did
you see him get hit?

A. No, I didn't see him get hit.

Q. Did you see the passenger train go under the
bridge?

A. Yes.

Q. How fast was that going?

A. I guess she was going a pretty good clip; she 30
had all on—

Q. About how many miles an hour do you judge
she was travelling?

A. She was going thirty-five or forty.

Q. She was not drifting?

Mr. Gaskill: I object to that as leading and suggestive.

A. She was not drifting.

Q. Well, was it drifting?

A. No, it was not drifting.

Q. Is that the train that hit him?

10 Mr. Logan Gaskill: I object to that because he has already stated that he did not see and also that it was the freight that hit him.

The Court: Yes; you did not see any train hit him?

The Witness: No, the freight couldn't hit him.

The Court: Let him tell us what he did see, Judge, and draw the inference, whatever it may be. He said he didn't see him hit at all. Of course, he can't tell us
20 what hit him; he may tell us the circumstances from which we may infer it.

Mr. Wescott: Yes.

By Mr. Wescott:

Q. Did this passenger train give any signals of bell or whistle?

A. No.

30 Q. How soon did you see Nugent after he was hit?

A. I guess about five minutes.

Q. How did you know he was hit?

A. Well, we saw—as soon as ever the passenger went by, why, he was right out in the ditch, and we saw a bunch of railroad men at work; they were working on the railroad then——

Q. As soon as——

A. Yes, just as the passenger train went by.

Q. Then his body appeared in the ditch?

A. Yes, in the ditch.

Q. Now, had the freight train got where his body was in the ditch? Where was the freight train when you saw his body in the ditch—do you understand?

A. I understand, yes.

Q. Well,——

10

By the Court:

Q. Listen to me a minute. You already said he passed in front of the freight train?

A. Yes, he got by the freight train.

Q. Which was on the third track; he got by that?

A. Yes.

Q. Now, counsel wants to know where the freight train was when he finally laid in the ditch?

A. The freight train was gone by.

20

Q. It had gone by, had it?

A. Yes.

By Mr. Wescott:

Q. It had already gone by?

A. Yes, gone by.

Q. Well, had it gone by when you saw this man's body in the ditch?

A. Yes.

Q. The freight train had gone by then?

30

A. Yes.

Q. Well, had the passenger train gone by?

A. Yes, the passenger train had gone by.

Q. Then they both had gone by?

A. Yes.

Q. Didn't the man get hit at all?

A. No.

The Court: Oh, no, he didn't say that; he said when he found his body in the ditch the trains had gone by.

Q. Then you didn't see his body get in the ditch?

A. No, I didn't see him get hit.

The Court: He said he didn't see it for five minutes afterward.

10

Q. Then if I understand you, you think it was the freight train that hit him or the passenger train?

A. No, the passenger train.

Q. It was the passenger train that hit him?

A. Yes.

Q. Well, did you go down there where his body was?

A. Yes, I went down where his body was, picked him up.

20 Q. What condition was his body in?

A. Well, it was—his head was toward the bridge.

Q. And was he cut or bruised or bleeding?

A. His face was bruised down here where I guess he was thrown down in the ditch.

Q. Was he dead then?

A. Yes, he was dead then.

Q. Let me get this straight; where was Nugent standing when he looked the second time?

30 A. Well, he was between the four tracks when he looked the second time.

Q. Between the third and fourth tracks?

A. You know there are two going west and two going east.

Q. And he was between the two, between the four tracks?

A. Between the two second tracks.

Q. Could you show on the picture there where he stood?

A. I can't see very plain.

By the Court:

Q. Can you see on this picture any better? Look at that one.

By Mr. Wescott:

10

Q. You see, this is one track?

A. Yes, and that is two.

Q. Now, where was he standing?

A. He was standing here between those, them four tracks. You see, there is one rail there and one over here, that is two; he was standing there. (Indicating.)

Q. Now, here, come up here; he wasn't down here opposite this tool house?

20

A. You can't see the rails here, see?

The Court: Well, Judge, if he doesn't know it there, you had better rely on his testimony. He says he was between the third and fourth track.

Cross-examination.

By Mr. Logan Gaskill:

30

Q. You were working for Gibbs & Hill, weren't you?

A. Yes.

Q. And you had been working for them about two weeks before the accident?

A. I was working for them longer than that, but not on the same bridge.

Q. Yes, and on this bridge about two weeks before the accident?

A. Yes.

Q. And the bridge you were working on was the one that carries the highway over the railroad tracks?

A. Yes.

10 Q. Now, what time did your gang start work on this bridge on the morning of this accident?

A. Well, we had just about started—we are supposed to get started about seven o'clock, but we usually got there—

Q. You were supposed to start your work on the construction of that bridge at seven o'clock in the morning?

A. Yes.

20 Q. Now, you would go by a train from Philadelphia to Berwyn?

A. Yes.

Q. And at Berwyn you would get off of the train and go to the bridge?

A. Yes.

Q. Now, usually did you go along the top of one of these banks?

A. No, we always—

Q. Or did you go down the railroad?

30 A. We used to go down the railroad usually, all the gang together.

Q. All the gang together?

A. Yes.

Q. How many was there in your gang working on that bridge at the time of this accident?

A. I couldn't say how many.

Q. Half a dozen?

A. Yes, probably more.

Q. And what time did your train get to Berwyn on the morning of this accident, the one that the gang of you was on?

A. I forget about that, I couldn't tell you.

Q. Well, it was before seven o'clock in the morning, wasn't it?

A. Yes.

Q. Now, what time was it when Nugent was struck?

A. Well, I guess it was about between seven and 10 eight o'clock.

Q. Well, was it nearer seven or eight?

A. I couldn't say; I didn't have any time.

Q. Well, have you any idea how long you had been working when he was struck?

A. No.

Q. Had you been working fifteen or twenty minutes?

A. Well, we was working a little while on the bridge.

Q. A little while—had you been working fifteen or twenty minutes?

A. I guess about fifteen minutes.

Q. Now, how did you happen to see Nugent walking up the track?

A. We were standing waiting—

Q. No, how did you happen to see him?

A. We were standing on the bridge.

Q. You were standing on the bridge?

A. Yes.

Q. Looking toward the Berwyn station?

A. Yes.

Q. How long had you been looking before he was struck?

A. Well, I guess about eight minutes.

20

30

Q. You had been looking for eight minutes—didn't you have a foreman up there to keep you busy?

A. Yes, but we were waiting for the train to go by before we go to work.

Q. Now, which train, the freight train or the passenger train?

A. Both trains.

Q. How did you happen to know that these two trains were coming?

10 A. We could see them coming.

Q. You saw them coming?

A. Yes.

Q. Saw them coming around this curve, didn't you?

A. Yes.

Q. Were you on the bridge or down on the tracks at the time?

A. No, on the bridge.

20 Q. Were the trains coming from Philadelphia toward Berwyn?

A. Coming from Philadelphia?

Q. Yes, were these two trains that you were waiting for coming from Philadelphia?

A. No.

Q. No?

A. They went to Philadelphia.

Q. They were going into Berwyn and then going into Philadelphia?

A. Yes.

30 Q. Now, what was the actual part of the work that you were doing on the bridge at this time?

A. I was putting up screens.

Q. Putting up screens?

A. Yes.

Q. What do you mean by screens?

A. The screens to screen the wires that go over the bridge.

Q. I understood you to say screens; did you say strings?

A. No, screens.

Q. What kind of screens were those?

A. Wire screens, I guess, about six or eight, some of them big.

Q. What were they put up for?

A. Why, to keep anybody from getting tangled up with the wire.

Q. Had you laid the floor of the bridge? 10

A. The floor of the bridge?

Q. Yes.

A. Sure.

Q. That had been laid and these big girders that carry the bridge had been put in place?

A. We wasn't doing any work on top of the bridge.

Q. That is what I want to find out.

A. It was underneath we had to do our work.

Q. You were doing this work of putting up these screens underneath the bridge? 20

A. Yes, right over the end of the bridge.

Q. Did you have a scaffold hanging from the bridge?

A. Yes.

Q. You were working on scaffolds putting up screens under the bridge?

A. Yes, setting up brackets underneath the bridge; we didn't need any scaffold for the screens here; the brackets go underneath.

Q. Why was it necessary for you men to stop your work while these trains came up and passed under the bridge? 30

A. Why was it?

Q. Yes.

A. We didn't want to get smothered in smoke down under the bridge.

Q. Well, then, did you get off of your scaffolds

and get away from the bridge and go up on top of it while the trains went by?

A. Well, we hadn't got down on the scaffold yet; we were getting some material on.

Q. I see, you were getting some material there?

A. Yes.

Q. And you weren't going to go down on your scaffolds until after these trains had gone by, that is the situation?

10 A. Yes.

Q. Now, you say that you saw Nugent over on the right of these tracks as you looked toward the bridge here at this tool house?

A. Yes.

Q. You saw him come up the platform of the station?

A. Yes.

Q. To the tool house?

A. Yes.

20 Q. And then you saw him walking up the ditch, you say?

A. Yes.

Q. Well, now, was that ditch on the same side of the tracks the tool house was on or the other side?

A. On the same side that the tool house was on, where he walked up.

Q. The passenger train that struck him was on this track that is on the left side of the picture?

A. Yes.

30 Q. That is, the right side?

A. Yes.

Q. The one that is shown so big right here in front?

A. Yes.

Q. Now, you noticed as you were working there that the trains that were going to Philadelphia came on this one track?

A. No.

Q. The passenger trains went on the far track, didn't they?

A. Passenger trains—

Q. Now, wait a minute; let me ask this: The passenger trains ran on the two outside tracks, didn't they?

A. Yes, on the side where he got killed

Q. Wait a minute; I am not asking you that. Now, we have all been over that road; just pay attention 10 to this: Did the passenger trains run on the two outside tracks?

A. Yes.

Q. Did the freight trains run on the two inside tracks?

A. The two inside tracks? I will be hanged if I know.

Q. You don't know which tracks the trains ran on?

A. Well, I know—

Q. And you worked there two weeks? 20

A. I know two tracks where the man got killed and the train pulled in, them two tracks—

Q. Wait, we are not asking about that at this time; I am asking you whether the passenger trains ran on the two outside tracks?

A. Yes, the two outside tracks.

Q. Which tracks did the freight trains run on?

A. They ran—the freight train came on that track there.

Q. No, I am not asking you about any particular 30 freight train; the freight trains that run over that road, what tracks did they run on?

A. Well, I am telling you, this freight train is coming to Philadelphia and telling you the track she was running on.

Q. I am not asking you about that.

Mr. Wescott: How does he know how they run their trains? They may run them on one track one day——

Mr. Joseph Gaskill: Well, they do not, as a matter of fact.

Mr. Wescott: Well, that has got nothing to do with this case.

10

Mr. Joseph Gaskill: He has been there two weeks and he ought to know.

The Witness: We have something else to do beside looking after the trains to see which way they are running.

Q. As a matter of fact, you worked on that bridge for a couple of weeks?

20

A. Yes.

Q. And you didn't notice which tracks the trains ran on?

A. No.

Q. You did not?

A. No, only knowed to get out of the road when I seen them coming.

By the Court:

30

Q. The train that struck Nugent was running on this track?

A. Yes.

Q. Now, was that train going to Philadelphia or coming from Philadelphia?

A. Coming to Philadelphia.

Q. Going to Philadelphia?

A. Yes.

Q. And was the freight train on the track next to it?

A. Yes.

Q. The freight train that you saw?

A. Yes.

Q. That was on the track next to the track the passenger train was on, was it?

A. Yes.

10

Q. And were the two trains running side by side when you saw them coming around this curve?

A. Yes.

Q. How far was the head of the passenger train away from the head of the freight train when you saw Nugent step ahead of the freight train or back of it? How far was the head of the passenger train from the head of the freight train when you saw Nugent step across?

A. How far? I don't know.

20

Q. Was it back of the freight train at that time?

A. Yes, back of the freight train.

Q. Well, after he had stepped across, how quickly did the passenger train pass?

A. Well, it was right up—I didn't see when he got hit.

Q. No, I understand that.

A. I saw him crossing the freight track.

Q. Well, from the position of the two trains, how soon was he hit after he passed the head of the freight train, after he crossed over ahead of the freight train, how quickly was he hit then?

30

A. I don't know.

Q. Well, you saw the two trains there, didn't you?

A. I saw the two trains, yes, but I didn't see the man when he got hit.

Q. No, I know, but you saw him when he crossed over?

A. Yes, I saw him crossing, yes.

Q. How near was the passenger train to him then?

A. The passenger train was pretty near up when he crossed the first track, but the smoke from the exhaust of the freight train, you couldn't see the passenger—

10 Q. No, but what I want to get at is, the passenger train was back, no matter whether you could see it or could not, when he crossed in front of the freight train?

A. After passing underneath the bridge it was—

Q. Well, it was close up to him, was it, then?

A. Yes, it was pretty close up to him.

By Mr. Logan Gaskill:

20 Q. Both trains had passed under the highway bridge when Nugent got struck?

A. Yes.

Q. And how far was the passenger train ahead of the freight train when the passenger struck him?

A. How far? Why, he got out of the road of the freight train—

Q. No, how far was the passenger train ahead of the freight train when the passenger train struck Nugent?

30 A. Why, the freight train was ahead of the passenger train.

Q. Oh, the freight train was ahead of the passenger train when the passenger train struck Nugent?

A. Yes.

Q. And they were both going in the same direction, toward Nugent?

A. Yes.

Q. Now, isn't it a fact, Joseph, that when Nugent got off over on this far side he walked across this planked way and came up the railroad track?

A. No, sir.

Q. Over this near track that we see here?

A. No, he came up here and got off on that side.

Q. He got off on that side and got his tools?

A. Yes.

Q. Now, then, what tools did he have in his hands?

A. I don't know what tools he had in his hands; he had his overalls. 10

Q. You say he had his overalls in his hands?

A. Yes.

Q. Now, you couldn't see him get his tools out of the tool box behind the tool house, could you—you couldn't see that, could you?

A. He had to get his overalls because he took them off there and left them, so he had to get them in the morning.

Q. The reason you think he went to the tool box was because he had his overalls and he couldn't have got his overalls except by going to the tool house and getting them? 20

A. Yes.

Q. But he did not get any tools out of the tool box, did he?

A. No, not that I know of; we had all the tools there.

Q. You had all the tools there?

A. Yes. 30

By the Court:

Q. Were his tools along the side of the road when you got up there, or not?

A. What?

Q. Were his tools up along the side of the road when you got there, or not?

A. No.

Q. He had no tools—after he was struck, I mean—he didn't have any tools?

A. No, he just had his overalls.

By Mr. Logan Gaskill:

10 Q. Did you find his overalls in his hands or had he put them on?

A. No, he hadn't put them on; he had them under his arm.

By the Court:

Q. What kind of path is there on each side of this railroad after you leave the station platform?

A. What?

20 Q. What kind of path was there on each side of the road after you left the station platform?

A. It was just a walk along the ditch.

Q. What is the ditch made of, is it cement?

A. No, just a ditch for the water, to clear the road.

Q. Where was the better walking, in the ditch or on the track?

A. Well, it was better on the track, but he walked up in the ditch.

30 Q. Was there the same kind of path or ditch on the other side?

A. Yes.

By Mr. Wescott:

Q. Wait a second; there is one subject, if the Court please, I forgot to ask this witness about. When you

people, the whole gang, went to work in the morning, didn't you go by train?

A. Yes.

Q. And you got off at this station?

A. Yes.

Q. Where this tool box was?

A. Yes.

Q. And was there any other way to get to the bridge?

A. No, that is the only way we could go up— 10

Q. Couldn't you get up on the right-hand side?

A. No, we would have to cross the fence, where the fences are in there, and we always used to walk up on the side of the road.

Mr. Logan Gaskill: I object to what the gang always did; that doesn't bear upon what Nugent was doing at this time. I ask that that be stricken out.

Mr. Wescott: He came the same way. 20

The Court: He can tell us whether this was the only way to get to the work from the station.

Mr. Logan Gaskill: Yes, but he has volunteered—

The Court: I understand that.

Mr. Logan Gaskill: Your Honor strikes that out? 30

The Court: Yes.

Mr. Wescott: Well, I object to that being stricken out, if the Court please. I am going to repeat the question.

The Court: Well, it is not responsive; I don't know whether the question is admissible or not.

Mr. Wescott: Well, of course, on that ground, perhaps the objection should be affirmed.

Q. How did you people from the time you began to work on the bridge get from the tool house to the bridge every day you went there?

10 A. Well, we used to walk up, as I say, up on that side so far, up to that tower, then cross over.

Q. Why didn't you go beyond the tower?

A. Well, we used to go beyond the tower so far where we would get to the other side; there was a path going up the hill up to our bridge.

Q. On the opposite side there was a path?

A. Yes.

Q. Well, wasn't there any path on the right side?

A. No.

20 Q. Where were your materials kept?

A. Our materials were kept—we used to have to go across the track for our material.

Q. Yes, but where were the materials kept?

A. The materials we did our work with?

Q. Yes.

A. Right down by the corner of the bridge.

Q. On which side as you went from the station toward the bridge, the right or left-hand side?

30 A. Why, on the side we used to walk up on in the morning.

Q. On the right-hand side as you were walking toward the bridge?

A. Yes.

Q. That is where your materials were deposited?

A. Yes.

Q. Then did you have to carry materials across the track?

- A. Yes, used to have to.
Q. Then up that path?
A. Yes.

By the Court:

- Q. Just a moment; did he pass this morning across where you always cross?
A. Did he pass——
Q. Did he cross over the track at the place where 10 the rest of you usually cross to get to this path?
A. Yes.

THOMAS DOYLE, SWORN.

By Mr. Wescott:

- Q. Mr. Doyle, did you know Nugent? 20
A. Yes.
Q. And you knew Powers, did you?
A. Yes.
Q. The gentleman who just left the witness stand?
A. Yes.
Q. Were you a member of the gang working on that bridge?
A. Yes.
Q. Where did you keep your materials?
A. The materials for that bridge? 30
Q. Yes, for doing your work.
A. Why, in underneath.
Q. In what?
A. Underneath.
Q. Underneath?
A. Yes, down in the right-of-way, where the trains come through.

Q. In between the tracks?

A. No, no.

Q. Well, on which side? I suppose now that you got off at the station, didn't you, when you went to your work?

A. Yes.

Q. And walked up the track a ways and then crossed over?

A. Yes.

10

Mr. Logan Gaskill: I object to that as leading and suggestive.

The Court: Yes, it is leading.

Q. When you went there in the morning, where did you get off?

A. Got off on the north side of Berwyn.

Q. At the station?

20

A. Yes.

Q. Then how did you go?

A. Went up the railroad.

Q. Well, on a track?

A. No, no.

Q. How did you go?

A. Up in the pathway.

Q. The pathway?

A. Yes.

Q. On which side of the track?

30

A. On the north side.

Q. That is to say, on your right-hand side as you were walking toward the bridge?

A. On the right-hand side, yes.

Q. Is that correct?

A. That is correct.

Q. Did you always have to go that way?

A. Yes.

Q. Now, how far did you go before you crossed?

A. Went up to the abutments of the signal tower.

Q. Where were your materials as to that abutment of the signal tower—where were they kept, how close to that?

A. Oh, about a hundred yards.

Q. Nearer the bridge?

A. Yes.

Q. How did you get your materials across?

A. Had to take them across, across the tracks. 10

Q. And when you got across the track, how did you get up on the bridge?

A. Took them up the foot path.

Q. Is that the way you always went?

A. That is the way.

Q. Was there any other way to go?

A. No other way to go.

Q. Did you see Nugent the morning he got killed?

A. Yes.

Q. Where did you first see him? 20

A. Down at the station at the tool box.

Q. Right at the tool box?

A. Yes, right at the tool box.

Q. Did you see what he did after he left the tool box?

A. Yes.

Q. What?

A. He walked up the foot path.

Q. The way he always went?

30

(Objected to.)

A. The way he always went.

Q. The way he always went or not?

Mr. Gaskill: I object to that as leading and suggestive.

The Court: The first question was leading.

Mr. Logan Gaskill: I think I have made such a point of that that counsel could not on a vital thing of that sort put that as a preliminary question.

The Court: Well, where did he walk?

The Witness: He walked up the path there where
10 they always go to the tower.

Q. You have already said, as I understood you, there was no other place to walk?

A. No, there is no other place.

Mr. Logan Gaskill: I don't think counsel should testify.

The Court: No, the witness has said so, but it is not
20 proper to repeat it to him.

Q. Well, he walked up that path to what point about, what place, Nugent?

A. Back of the abutment of the towers, in there.

Q. Then what did he do?

A. He stopped and he looked both ways and he crossed until he got to the third track, and he stopped and he looked toward the bridge.

Q. Then what?

30 A. Then he came on. Well, I never seen him after then.

Q. He came on; did you see where he got to?

A. No.

Q. When did you next see him after that?

A. When he was killed.

Q. Did you see him hit?

A. No.

Q. Is there a curve there near that bridge anywhere?

A. Yes.

Q. How much of a curve is that?

A. It is quite a bit.

Q. Quite a big curve?

A. Yes.

Q. When Nugent was crossing the tracks did you see any trains anywhere?

A. Saw the freight.

10

Q. Where was the freight?

A. It was about 150 yards.

Q. From where?

A. From Nugent.

Q. Had the freight come under the bridge yet or was it coming under or not?

A. No, she was not under the bridge yet.

Q. Had not reached the bridge yet?

A. No.

Q. About how close to the bridge was the freight, 20 do you judge?

A. Well, I should judge about fifty yards.

Q. Going at about what rate of speed?

A. About between fifteen and twenty miles, I guess.

Q. That is your judgment?

A. Yes.

Q. Well, did you see any other train at that time?

A. Not at that time, no.

Q. How soon afterward did you see another train? 30

A. When the freight approached the bridge.

Q. What kind of train was it you saw then?

A. A passenger train.

Q. Which way was it going?

A. Going to Philadelphia.

Q. The same way the freight was going?

A. The same way the freight was going.

Q. How fast was that train going in your judgment?

A. She was going pretty fast, I guess between forty and forty-five miles.

Q. Did it give any signals when it went under the bridge?

A. No.

Q. Can you tell whether or not that passenger train had its power on when it was going under the
10 bridge?

A. Yes.

Q. It did have it on?

A. Yes.

Q. Did you see Nugent at all after he was killed?

A. Yes.

Q. How soon after he was killed was it that you saw him?

A. About three or four minutes.

Q. How did you find out that he was killed?

20 A. Well, we were in the exhaust of the train going underneath the bridge; we was getting out of the exhaust, we was out of the exhaust of the train coming underneath the bridge.

Q. Then what?

A. Then after she passed we looked down, after the exhaust got away, and we saw this man lying—
There was railroad men there, so they hollered—

By the Court:

30

Q. How near was his body found to the place where he crossed over?

A. Where he started to go up to the bridge after getting across?

Q. No, you said he started to cross the tracks, that he reached the third track and stopped?

A. Yes.

Q. Now, how far was his body found from where he stopped the last time?

A. Twenty yards, I guess.

Q. Which way, toward the bridge or the other way?

A. Toward the bridge.

By Mr. Wescott:

Q. Which one of these trains came under the 10 bridge first, the freight or passenger?

A. The freight.

Q. How soon did the passenger train come under after the freight got under?

A. About five minutes, I guess.

Q. Do you realize how long five minutes are?

A. Five minutes?

Q. Why, you could walk from here to the ferry in five minutes.

20

Mr. Logan Gaskill: I submit the answer stands as given.

Q. Did you get any instructions from the foreman about how the trains should go under that bridge while you were working there?

(Objected to as incompetent, irrelevant and immaterial.)

30

A. Yes.

Q. What were they?

(Objected to.)

The Court: The objection is overruled.

(Exception noted for the defendant.)

Q. What instructions did you get?

Mr. Gaskill: I object to that for the same reason and ask an exception.

(Exception noted.)

10 A. We got instructions that all trains should drift through this bridge in working hours.

Q. And did they drift through?

A. Yes.

Q. Was this passenger train drifting through?

A. No.

Q. When you saw Nugent the last time, when he stopped the second time, can you tell us just exactly where he was standing, whether it was between the two tracks or the two sets of tracks, if I am making

20 my idea clear to you?

A. Yes.

Q. Well, just tell us.

A. He was standing on the third track.

Q. Well, was he standing between the two rails which constitute a track or was he standing between two sets of rails which constitute two tracks?

A. He was between the two tracks; he was in the center.

Q. In the center?

30 A. Yes.

Q. There are four tracks, four sets of tracks there?

A. Four tracks, yes.

Cross-examination.

By Mr. Logan Gaskill:

Q. You fellows had foot paths both sides of the railroad track to that bridge, hadn't you?

A. Foot paths?

Q. Yes.

A. No, sir.

Q. Didn't you go up both sides of the tracks to 10 the highway?

A. No, sir.

Q. Now, you say that during the weeks that you had been working on this bridge you had taken the risks of walking backward and forward across these tracks?

A. Yes.

Q. When you could easily have made paths, foot paths up both sides—is that so?

A. Well, the bank is too steep to get up.

20

Q. You mean to say that the bank over on this side is steeper than the bank on that side, do you?

A. Yes.

Q. And you mean to say that the bank over here on the right side is steeper than the bank on that side?

A. Yes.

Q. And that because the bank on the left side was so steep that you made no pathway up there to the top?

30

A. On the right side we made no pathway.

Q. Yes, on the right side you made no path?

A. No.

Q. And you made no pathway up there simply because it was steep?

A. Yes.

Q. And your material you say was unloaded from the cars on to the right side?

A. Yes.

Q. And you carried all your material across those four tracks and then carried it up on the left side?

A. Yes.

Q. Now, a good deal of the material was unloaded and swung by derricks up into place, wasn't it?

A. No.

10 Q. Well, these great pieces across the side here, they were swung up?

A. Them girders, yes.

Q. Those girders were swung up in place, weren't they?

A. Yes.

Q. From the trains?

A. Yes.

20 Q. Well, a good deal of material, all the heavy material was swung up by derrick on to the top of that bank, wasn't it?

A. Yes.

Q. You only carried the lighter stuff up?

A. Yes.

Q. Now, you have said that the walking was better up the ties than it was in the ditches on the side—that is so, isn't it?

A. Oh, no.

The Court: He didn't say anything about that; it
30 was the other witness.

Q. Well, now, isn't it a fact that the walking was smoother and easier up on the railroad ties than it was down in these ditches?

A. No.

Q. It was not?

A. No.

Q. Isn't it a fact that you usually walked up the tracks over the ties?

A. No.

Q. From the Berwyn station?

A. No.

Q. And isn't it a fact that when you got off your train you usually walked across this platform here to the left side and then up that brick walk and up the track?

A. No.

10

Q. Now, what were you doing when this accident happened?

A. Just on the bridge.

Q. You were on the bridge?

A. Yes.

Q. And what were you doing on the bridge?

A. We were getting material ready to connect there.

Q. Getting the material ready—what material were you getting ready?

20

A. Screens.

Q. What were you going to do with them?

A. Put them out on the outside of this girder that goes along there for safety.

Q. Now, how did you happen to see Nugent down at Berwyn?

A. Well, we were getting that stuff ready and we looked down and saw him.

Q. Well, did you see him?

A. Yes.

30

Q. And you could see him walk up the track while you were working?

A. Yes.

Q. Then you say you saw him come up the right side of the track?

A. Yes.

Q. And cross over?

A. Yes.

By Mr. Wescott:

Q. Did he cross at the usual place?

A. Yes.

Q. Now, there is one thing about that path on the other side; did you build the path or was it there?

10 A. That was there.

GERALD O'BRIEN, SWORN.

By Mr. Wescott:

Q. Did you see Nugent that morning?

A. Nugent, yes.

Q. Where did you first see him?

20 A. I seen him to the tool box.

Q. And then he did what?

A. Then he took his overalls and walked across the track; I saw him at the tool box when he took his overalls; I didn't see him afterward.

Q. You didn't see where he went after he got his——

A. I saw him when he took the overalls out of the tool box and stood on the platform and looked both ways.

30 Q. Then from that point you did not see him?

A. No.

Mr. Logan Gaskill: I object to that as leading and suggestive.

Q. Well, did you see him from that point?

A. What?

Q. Did you see him after that?

A. Never seen him after that, no.

Q. Did you see the trains that went under the bridge?

A. Yes.

Q. What kind of trains were they?

A. Freights and passenger trains.

Q. Did the passenger train give any signals when it went under the bridge?

A. No.

10

Q. How fast was it going?

A. Well, I guess between forty-five and fifty miles.

Q. Was it drifting?

A. What?

Q. Had it power on or was it drifting?

A. Power on.

Q. Now, where was your material dumped?

A. On the right-hand side.

Q. How did you get the material to the bridge? 20

A. Well, we used to take the iron we were working with on our shoulder.

Q. And then you would go where?

A. We would go across to the left-hand side and walk up on the bridge with it.

Q. Go up a path?

A. Yes, a foot path.

Q. Was that the only foot path there?

A. On that side, yes.

30

The Court: Does he know anything about this practice of stopping trains or slowing them?

Q. Do you know whether the trains drifted usually under that bridge after you went to work there?

A. Used to drift?

Q. Yes.

A. Yes.

Mr. Wescott: He was not present when the instructions were given.

The Court: Well, he can tell us what the custom was, if he saw it.

10 Cross-examination.

By Mr. Gaskill:

Q. Now, I understand you to say that you saw Nugent get his overalls out of the tool box?

A. Yes.

Q. Now, how could you see him through this tool house?

A. What tool house?

20 Q. This tool house here? Your tool box was back of the tool house; now, how could you see him through the tool house?

A. The tool box is on the front of the station house.

Q. Oh, the tool box was not back there after all?

A. No, it wasn't on the back; it was on the front.

Q. Oh, it was on the front?

A. Yes.

30 Q. The front of the station, not the front of the tool house?

A. No; the front of the tool house, yes; well, it was a tool box, it wasn't a tool house.

Q. Now, look, here is a little narrow platform in front of that tool house; that is an elevated platform; there wasn't any room there for the tool box, was there?

A. It was on the higher part.

Q. On what?

A. On the higher part.

The Court: What is that building there—it is not a tool house, is it?

The Witness: That is a freight house.

The Court: That is a freight house, is it?

10

The Witness: Yes.

By Mr. Logan Gaskill:

Q. All right; it has been called a tool house by everybody up to date.

A. Well, you can call it any old thing, I guess.

Q. Now, whereabouts was your tool box in respect to that freight house?

A. Right in front of it.

20

Q. How wide is that platform in front of the freight house?

A. I don't rightly know.

Q. Now, when he got his overalls, how did he get down off the platform?

A. How did he get down? Why, he walked down on the track.

Q. Well, did he jump down on the track or walk down the steps or what?

A. He walked down.

30

Q. He had no tools in his hands, did he?

A. He had his overalls.

Q. You fellows had taken the tools up with you before, hadn't you?

A. The tools was on the job.

Q. And you say that you saw him, when he got down on the platform, look both ways?

Q. Now, they made noise enough for you to hear them?

A. Oh, certainly; on the bridge you could hear them going by.

Q. It was a long freight train, wasn't it?

A. I don't know how long it was.

Q. And a passenger train too?

A. Yes, a passenger train.

Q. You heard the exhaust?

A. Yes.

10

Q. And you saw the steam of this exhaust there?

A. I guess I did, had to get off the bridge for the steam, anyhow.

Q. What did you mean when you said there was no other path up that side?

A. What I mean?

Q. Yes.

A. When I said there was no other path on what side do you mean?

20

The Court: He did not testify about that, did he?

Mr. Logan Gaskill: Yes, he said there was no other path up that side. He was talking about carrying up the material.

The Witness: I didn't say there was no other path up that side.

Q. Were there paths on both sides up both of 30 these banks?

A. No, there was only the path on the left-hand side.

Q. Only the path on the left-hand side?

A. Yes, we should cross the track when we get off the train to go to our work, or to climb to work.

Q. Why didn't you make a path up this right side?

A. Why didn't I make it?

Q. Not you, but you and the rest of the fellows?

A. Why, I didn't have to.

Q. You didn't have to?

A. No.

Q. You were willing to take the chances of walking back and forth across these four tracks rather than make a path up the right side, were you?

10 A. I was willing?

Mr. Logan Gaskill: (To the stenographer) Read him the question, please.

A. Well, there was no path——

(Question repeated.)

A. Well, I didn't see any path there and I wasn't
20 going to make it.

BEN ZION D. OLIENSIS, SWORN.

By Mr. Wescott:

Q. Mr. Oliensis, you are what by profession?

A. I am a member of the Philadelphia bar.

30 Q. And have been how long?

A. Since 1901.

Q. What is the rule in Pennsylvania with reference to a person who is permissibly crossing railroad tracks——

Mr. Logan Gaskill: I object to that as incompetent, irrelevant and immaterial, and also because

it involves a disputed question, that of one permissibly crossing railroad tracks.

The Court: I don't know what the question is yet; I don't suppose it is completed. Let's have the question completed before the objection.

Mr. Wescott: Well, that is the question. There is a different rule in Pennsylvania on the subject, and I want to ask this gentleman about it. 10

(Question repeated.)

Mr. Joseph Gaskill: I want to add to the objection, because it is not shown that this witness is qualified.

The Court: Let me have the question.

(Question repeated.) 20

The Court: Well, that is very indefinite, Judge, I don't know what you mean.

Mr. Wescott: Well, perhaps it is; I will withdraw that question.

Q. What is the rule in Pennsylvania with reference to the duty of railroad companies to persons who are permissibly on or near the tracks or premises of such companies? 30

Mr. Joseph Gaskill: We make the same objection as before and the further objection that this is not the best proof as to the rule. If it has been the subject-matter of decision in the state of Pennsylvania, the decisions certainly show the rule.

The Court: Who is to interpret those decisions?

Mr. Joseph Gaskill: Well, my objection goes further, that this man has not been shown to be qualified.

The Court: Well, isn't any member of the bar qualified, presumably?

10 Mr. Joseph Gaskill: No, sir, I think not.

The Court: Well, why not?

Mr. Joseph Gaskill: Your Honor thinks that simply because a man may be a member of the bar that he is therefore qualified, necessarily qualified to testify as to the law of any state on any particular point?

20 The Court: You mean in fact or in law?

Mr. Joseph Gaskill: Well, I will let my objection stand without any further discussion with the Court.

The Court: You don't want to give me any information when the Court asks for it?

Mr. Joseph Gaskill: Yes, I do, most cheerfully.

30 The Court: Then, don't say that you will have no further discussion with the Court. The objection is overruled; the witness may answer the question.

Mr. Joseph Gaskill: Your Honor gives us the benefit of an exception for both——

The Court: Yes.

A. Will you please ask the question over again?

(Question repeated.)

A. Why, the rule in Pennsylvania is, of course, that the railroad must exercise reasonable care with reference to persons who are crossing or near the tracks. This necessarily involves a second subordinate question, to what extent they have to exercise reasonable care. That varies in different cases. Where there is a regular, distinct, public crossing, of course, the care required to be observed by the railroads is much greater than when the crossing is not a regular one, but is what we call a permissible crossing, that is, a crossing which, although not regular still by lapse of time and by usage of the public has become sort of permissibly recognized as a crossing; there in view of this the railroad must exercise reasonable care under the circumstances. 10 20

By the Court:

Q. What is the situation where men are working on and about a railroad and in the performance of their duties they are called upon to cross the tracks?

A. When they are working—

Q. What obligation is there resting on the railroad under those conditions? 30

A. Under those conditions, the railroad must exercise the reasonable care required under the circumstances.

Q. Well, is there any rule as to what reasonable care is?

A. No, the question of reasonable care in Pennsylvania is purely a mixed question of law and fact. The law is abstract and the facts must be fitted into each case. The greater, that is, the more frequent the circumstance at which the people are there, the greater the care that must be exercised by the railroad. If a man, for instance, works on the tracks, as, for instance, fixing up things or doing things that require his presence right close to the track or upon
10 the track, the care to be exercised by the railroad must necessarily be greater than where he has simply to be there occasionally in the performance of his work. And then in another case, where he don't have to be on the track, but in the performance of his work he has occasion to cross the track, then, of course, the care is according to the circumstances. It is a question for the jury to determine in view of this law.

20 Mr. Joseph Gaskill: If the Court please, I move to strike out the whole of this witness's testimony, it being incompetent, irrelevant and immaterial.

The Court: Is it intended to urge the objection already made, or is there something in the answer itself which you think is incompetent?

30 Mr. Joseph Gaskill: In addition to the objection already made, it seems to me that the testimony of the witness does not throw any light whatever upon what the law is in Pennsylvania and that he practically at the end of his answer has said that it is a jury question, which we knew from the outset.

The Court: No, I don't think I can strike it out. Note an exception.

By Mr. Wescott:

Q. Is the rule in relation to this matter explicated in any decision to which you can call our attention?

A. The rule as regards people working on the tracks——

Mr. Logan Gaskill: I object to this, if the Court please, because he is not answering the question as put.

10

The Court: The question is whether that rule that you have already spoken of, told us about, is exhibited in any decision of the Court?

The Witness: Yes, I am just proceeding to answer it.

Q. Well, is it or not?

A. It is.

20

Q. Have you the decision here?

A. There is one of the latest cases, VanZant vs. the Railroad in 248 Pennsylvania, which deals with the question of people, workmen working about or near the tracks, and the degree of care to be exercised by the railway in running trains in view of that situation.

Q. I show you the case of VanZant vs. Philadelphia, Baltimore & Wilmington Railway Company, and I ask you if that is the case to which you refer?

30

Mr. Logan Gaskill: I object to that, because that is incompetent, irrelevant and immaterial. The book cannot be presented or offered to the jury, and cannot be referred to by counsel in the presence of the jury.

The Court: I am not so sure about the admissibility of this for such a purpose. It will be permissible under the statute to bring to the attention of the Court and the Court may examine the reports of other cases.

Mr. Wescott: Yes, that is my object.

10 The Court: This is, however, not that question; this is a jury question, isn't it?

Mr. Wescott: My point now is to identify the exhibition of this proposition.

The Court: Yes, but they object to that, and it is objected to on the ground that you are putting before the jury who are to determine this question of law, curiously—

20 Mr. Wescott: Oh, no.

The Court: Oh, yes.

Mr. Wescott: I am not going to introduce this case in evidence; I am simply identifying the case.

The Court: Oh, then, perhaps it would be better not to refer to it except by reference to number.

30 Mr. Wescott: Well, I will withdraw that question.

Q. Let me ask you, is that an opinion by the Supreme Court of Pennsylvania?

A. That is an opinion by the Supreme Court of Pennsylvania, a unanimous opinion.

The Court: Well, I don't know about it either; I suppose the best evidence of the decisions of the courts are the decisions themselves, and when they are authenticated I see no reason why they should not be introduced before the jury.

Mr. Logan Gaskill: My point is, the law is for the Court, not for the jury, whether it is the law of this state or any other state.

10

The Court: The law of this state is; the law of another state is not.

Mr. Logan Gaskill: It is for the Court to construe and determine what is the law of another state when reference is made to the books. Now, I distinguish between the testimony of the witness as to the law—

The Court: No, but you see, Mr. Gaskill, it all goes to the question, does it not, of what the law of Pennsylvania is on a given subject? 20

Mr. Logan Gaskill: True, yes, sir.

The Court: Now, in this kind of case, that is for the jury, isn't it? What is the decision of the Court in that very recent case that we tried here against the Buffalo Coke Company—do you remember that case? 30

Mr. Logan Gaskill: No, your Honor.

The Court: There it was flatly held that the question of law where it becomes a question of a decision of another state is for the jury, when it is a jury question in general.

Mr. Logan Gaskill: I do not understand that this Court can be deprived of the power of dealing with the legal questions in this case by bringing a suit in this state rather in Pennsylvania.

Mr. Wescott: That is not our object at all.

The Court: Well, apart from that, that was just what was held in the case that I am referring to.

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Mr. Logan Gaskill: I do not recall that decision.

The Court: Well, go on. How far do you want to go with this, Judge?

Mr. Wescott: I just want to identify the case.

The Court: Well, he has identified it.

Mr. Wescott: The situation is this, if your Honor will bear with me for a moment. We want to show the law of Pennsylvania by one of the members of the bar on a given subject. Now, we have done that; that brings it to your Honor's attention. We know what the law is in this state on the given subject and the law of Pennsylvania happens to be a little different. This accident having occurred in Pennsylvania is controlled by the law of that state, and I have taken this method to put in your Honor's possession the law of the state of Pennsylvania in relation to a situation of this sort. I am only doing it out of abundance of caution, because the law of this state controls the situation in my opinion, but the accident having happened in Pennsylvania, I thought it would be proper for your Honor to know just what the law is in that state, but you know anyhow, because you are a member of the bar of Pennsylvania and practiced there for many years.

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30

The Court: I forgot all the law I ever knew over there.

Mr. Wescott: Now, there is one other question I want to ask this gentleman in relation to the duty of the railroad company to an employee of one of its contractors on or near its right of way.

Q. What is the rule in Pennsylvania?

Mr. Joseph Gaskill: We make the same objection as heretofore. 10

The Court: Note the objection and an exception to it.

A. That is laid down in the same case that I referred to.

Q. The same case you referred to?

A. Yes. 20

The Court: Well, what is the rule?

The Witness: The rule is that the railroad must exercise reasonable care under the circumstances, in view of the fact that the employee of the contractor has to work on or near the tracks.

Mr. Joseph Gaskill: I move to strike out that answer if the Court please, as being irrelevant, immaterial and incompetent. 30

The Court: The motion is overruled and an exception noted.

Q. What is the legal presumption in Pennsylvania

where a man has been crossing the tracks of the company or where a person is killed while crossing the tracks of the railroad company, with reference to his exercise of care?

Mr. Joseph Gaskill: I make the same objection if the Court please, on the same grounds.

The Court: The objection is overruled and an
10 exception noted.

A. When a man is crossing the track and has been killed, the presumption is that he has exercised all the care requisite under the circumstances, that is, that he has stopped, looked and listened, which is the summing up of the rule in Pennsylvania.

By the Court:

20 Q. Is that the decision in Weiss vs. the Railroad?

A. Oh, there are a hundred of them.

Q. I say, is that one of them, Weiss vs. the Railroad?

A. I don't remember, your Honor; I can give you a number of decisions, comparatively recent ones.

By Mr. Wescott:

30 Q. Is there any rule in Pennsylvania in relation to the establishment of a custom or a rule which controls the conduct of a railroad company toward its employees?

Mr. Joseph Gaskill: I make the same objection as before.

The Court: You mean, any legal rule?

Mr. Wescott: Yes.

A. I would like to hear that question repeated.

(Question repeated.)

Mr. Wescott: Well, I will withdraw that question.

No cross-examination.

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PLAINTIFF RESTS.

Mr. Logan Gaskill: If the Court please, we move for a non-suit in this case on the ground that the decedent, Nugent, had assumed the risks incident to his employment, and that his death on this morning came by one of the risks which he had assumed; that he was guilty of contributory negligence under the testimony in the case, because he walked up, under their testimony, along the side of the track and crossed over the tracks, and he is not excused by the fact that he is said to have looked and listened, because he could have gone up the bank on the right side, the side he was on, and he is not excused because he and the other men had not made a path for themselves up that bank. Now, with respect to the facts under which he went up the tracks, he is not excused, because the testimony is that these trains were making considerable noise, and they were within his view at the time he was struck. This curve was five times eight-five paces beyond the bridge, and when both trains got in the neighborhood of the bridge and passed under and beyond the

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bridge, they were clearly within his view, and he could have seen them. It is evident that the men who were off at some considerable distance, when they say that they saw him stop and look were misled by their senses as to what he actually did, because if he had stopped and looked the two times as stated, he could not have failed to see them. Now, there is a good deal of confusion with respect to the position of these trains. I think two of the witnesses
10 —the last witness did not say anything beyond his looking on the platform—put this freight train ahead of the passenger train. Certainly one of them, Doyle, put the freight train in distance as well as time considerably ahead of the passenger train.

The Court: I so understood all of them.

Mr. Logan Gaskill: Yes, and I understood all of them the freight was ahead of the passenger. Now,
20 then, he did not pass between the freight and passenger train, but he passed ahead of them both, so that it is very evident under their statement of the fact that the accident could not have happened as it is said.

The Court: Isn't it a fair inference from the testimony, Mr. Gaskill, that this man when he stopped the second time between the two sets of tracks, in the center between the four tracks, that he then
30 observed as to the approaching freight train, that the passenger train was hidden from him at that point, that he then passed over and cleared the freight train, but was struck by the passenger train which was moving much faster?

Mr. Logan Gaskill: I want to make that point, that he was guilty of contributory negligence by at-

tempting to pass over these two tracks when his view of the far track was obscured by a train going on the track which was then near the track to him, and it seems to me he is not excused from his duty by reason of any alleged instructions with respect to the trains drifting under that bridge.

The Court: I quite agree that the mere presence of instructions from his own employer would not in any wise affect either his own duty or the duty of the railroad, but the evidence of the case is that it was acted upon, that theory, and that the railroad actually did conduct its train service there in conformity with it. Now, when the notice that he receives and the action of the railroad confirming it exists, isn't he there in a position where he may rely upon the observations of such a rule, if it be one? 10

Mr. Logan Gaskill: No, this man was not with the gang; he was not at work with the gang; he was on his way to the gang and was according to the opening 120 yards from it, and according to the testimony of Doyle was fifty yards from the gang at the time he was struck. Now, it seems to me that such duty as there might be from the movement of these trains would not apply to a man beyond that point; in other words, they might slow up to be certain that there were no men on the track, that no material had fallen from the bridge, but certainly after the engineer got up to the bridge, he could then put on his speed and go at the usual rate or make up his time in getting down the track to the next point. It seems to me that it is a case where the man was a licensee, he is not entitled to the full duty of care, he was not at a regular crossing—I may say as to the point that so much has been made of, that these men had 20 30

adopted a regular place for crossing over, it does not seem to me that that has any weight in this case at all; it was a thing that had arisen for such a short time that it cannot be assumed that the company had notice of it or had any reason to anticipate it or to take care against injuring men crossing at that point. I do not think that this can come within the rule of crossings not regular crossings, but crossings which have been made by long established public use. This was a very short period of use and
10 by these few men.

The Court: Oh, I don't think it rests on that at all; I don't think it can rest on that. I think it must rest on the proposition that here were men working on the railroad whose duties required them in going and coming to and from their work as well as in attendance upon it to make certain uses of the track and under those conditions, what was the duty of the
20 railroad company on the one side and what was the duty or the obligation of the deceased on the other? It seems to me it all turns upon that. I gather from this testimony that this set of facts could be inferred by the jury: First, that these men were working there, that they were working there on the company's bridge, and that that necessitated their getting more or less on the track or on the roadbed in connection with their work, and particularly in going and coming; that this man had gotten something out of his tool box, the tool box kept for them
30 all, and that he walked up the side of the track until he got to a point opposite to another path on the opposite side, and then he crossed over, and as he was in the act of crossing he was struck. There is some evidence which militates against that, but that is fairly inferable from some of the testimony, isn't it?

Mr. Gaskill: I think so, yes, sir.

The Court: Now, in that situation, doesn't it become a jury question whether he in doing what he did, namely, stopping twice under the circumstances, performed the full obligation resting upon him, and whether the railroad company performed any obligation which might rest upon it under the circumstances.

10

Mr. Logan Gaskill: It seems to me not, because he did not make his stopping, looking and listening effective as it should have been under the circumstances, and also because he assumed the risk under the facts stated by your Honor. Railroad tracks are a place of danger, and unless a man can bring himself within the exceptional class of people working on the tracks, he was clearly a trespasser. Four tracks are certainly extremely dangerous, and this man was bound to exercise for himself while on those tracks, in a position where ordinarily he would have been a trespasser, a high degree of care.

20

The Court: Do you remember a case that was tried in this state arising out of an accident against the Long Branch Railroad Company—I have forgotten the name of the plaintiff—where the rule of not permitting the train to pass while another passenger train was standing was involved? A boy was taking his dinner to his father, who was an engineer of the train; he had no duties in connection with the railroad at all, but the railroad had permitted him to carry his father's dinner to him, his meals, and he ran out across this track without looking at all, and in violation of that rule a train did come along and the Court held in that case that both questions were for the jury.

30

Mr. Logan Gaskill: I don't recall that case at all. The only thing that is at all similar that I can recall is the Fitzpatrick case against some glass company, here a boy was carrying his dinner to his father and was injured at the plant and it was there held that the boy was a licensee, he was carrying the dinner to his father and the company owed no duty to him except to refrain from acts of wilful negligence.

10

The Court: I think you will find this case I have referred to has a very close analogy to the case on trial. I do not think I can rule it as a question of law. I will deny the motion and note an exception.

20

Mr. Joseph Gaskill: If the Court please, I desire to make another motion, and that is that your Honor shall withdraw a juror on the ground that the opening stated that the instructions which were given by the foreman to the men would be traced directly to the railroad. Your Honor overruled our objection on the statement of counsel that they would connect it with the railroad company, and again when the testimony was introduced objection was again made and your Honor again asked the question and you were again informed that it would be traced to the railroad company. Our point is that, not having done that, that the defendant in this case is prejudiced by reason of the fact that that testimony is in before the jury and under a promise that it would be connected with the railroad company, and it seems to me that in justice to the defendant, a juror should be withdrawn.

30

The Court: Why do you say it has not been connected?

Mr. Gaskill: They have not proven that the railroad company gave any such rule as that or any such instruction.

The Court: No, but there is proof that they observed it.

Mr. Joseph Gaskill: Yes, but if the Court please, the opening was in response to your Honor that they would trace it to the railroad company, the giving of such a rule. 10

Mr. Wescott: We did trace it directly to them.

The Court: Well, that is tracing it, isn't it? The rule is that where the company either by the creation or adoption of a rule chooses to stand for it that it is answerable.

Mr. Joseph Gaskill: However, if the Court please, that is my thought in regard to it. 20

The Court: Well, if it becomes a question where later on I should conclude that it had not been traced, I will then deal with it by cautioning the jury not to pay heed to it, but my present impression is that where the company operates its trains in conformity with such rule, and apparent rule, that it is some evidence to go to the jury as to its existence.

30

Mr. Wescott: That rule arising under the peculiar circumstances of this case.

The Court: Oh, certainly, it cannot be general.

At this point a recess was taken until 1.30 o'clock P. M.

Trial of the cause resumed after recess, pursuant to adjournment, in the presence of counsel for the respective parties.

THE CASE FOR THE DEFENDANT.

WILLIAM S. McFADDEN, SWORN.

By Mr. Gaskill:

10

Q. Mr. McFadden, where do you live?

A. Harrisburg.

Q. Were you the engineman of this train that struck Nugent on April 6, 1915, near the Berwyn station?

A. Yes, sir.

Q. With respect to Philadelphia, which way were you going, inbound or out?

A. Inbound.

20

Q. Which track were you running on?

A. No. 1 track.

Q. Now, I show you a photograph which was taken at the Berwyn station; which is No. 1 track as shown there?

A. This one over here.

Q. That near one that is shown large?

A. Yes, sir.

30 Q. With respect to this tool house or freight house over on the far side of the picture, which track is that?

A. That is No. 4 track there.

Q. No. 4 track over there?

A. Yes.

Q. Now, with respect to the way the trains run, which trains run on the two outside tracks?

A. Passenger tracks.

Q. And which run on the inside tracks?

A. Freight tracks. 2 and 3 tracks are freight tracks, you know.

Q. 2 and 3 tracks are freight tracks?

A. Yes.

Q. Now, on No. 3 are the freight trains inbound to Philadelphia?

A. No. 2 is the freight inbound; that is two right next to this one there. The fence divides the tracks there at the station.

10

Q. Now, what was your train, an express or local or what?

A. Local.

Q. Did it make a stop—was it about to make a stop at Berwyn station?

A. Yes, sir.

Q. Now, this overhead bridge that is shown in this picture, had the girders been constructed and the floor laid on April 6th when this accident happened, do you know?

20

A. Now, I couldn't answer that question; I know the bridge was there, but I couldn't—

Q. You know the bridge was there?

A. Yes.

Q. Now, what speed were you running as you rounded that curve and approached the Berwyn station?

A. Well, I was running between twenty and twenty-five miles an hour.

Q. How are you able to fix that speed?

30

A. I had already made a reduction to make the station stop.

Q. You made a reduction for the station stop?

A. Yes, sir.

Q. With respect to power, were you under power or not as you came out from that curve and under that bridge to the station?

A. No, sir, I was drifting at the time, had shut off—

Q. At the time, what time?

A. I had shut off away west of that point. It is down grade there, you know.

Q. Can you by this picture No. 3 locate the spot where your engine struck Nugent?

A. Well, it was between this signal bridge here and the tool house there.

10 Q. Now, you are pointing to the tool house on the left up by the highway bridge?

A. Yes, that is on the left.

The Court: Where is that, between the tool house and the—

Mr. Logan Gaskill: The signal bridge.

20 The Court: This tool house has not been pointed out.

Mr. Logan Gaskill: It is a little building up here let me show your Honor. You see that is the signal bridge and that is the tool house there. (Indicating in photograph.)

The Court: Yes; well, that is distinguished from the tool box entirely?

30 Mr. Logan Gaskill: Yes, sir.

Q. Now, did you see this man before you struck him?

A. Yes, I was right on top of him, though, before I did see him.

Q. Where was he when you saw him?

A. Well, he was about twenty feet from the engine,

walking right into the engine on the outside of the track, on the ends of the ties.

Q. What did you do when you saw him?

A. I applied the emergency brake.

Q. Can you tell me how much the ballast lifts those ties up above this ditch that is shown over on the extreme left in the second picture?

A. How high it is raised?

Q. Yes.

A. Well, I suppose it is eighteen inches anyhow, 10 or two feet.

Q. Now, was the train giving any signals as it came under this bridge and went down toward that station?

A. Why, the fireman was ringing the bell at the time.

Q. What bell?

A. The engine bell.

Q. How long had he been ringing the bell before your engine struck Nugent? 20

A. Well, he started to ring it up west of the pike, the pike bridge there, coming around the curve; the track men was on the track.

Q. Whereabouts, as shown in this picture No. 3 were the track men at work?

A. They were up here about the signal bridge; there were some west of the signal bridge, between there and this pike bridge, I think right along there, somewhere.

Q. Was the bell ringing at the time the engine struck Nugent? 30

A. Yes, sir.

Cross-examination.

By Mr. Wescott:

Q. You were on the right-hand side of the engine I suppose?

A. Yes, sir.

Q. Looking out ahead?

A. Yes, sir.

10

Mr. Logan Gaskill: Pardon me, Judge; I didn't make one point clear.

By Mr. Logan Gaskill:

Q. You have spoken about seeing him walking on the outside of the ties—on which track?

A. On No. 1 track.

Q. Is that the track that your train was on?

20 A. That is the track that I was on, yes.

Q. Now, with respect to this freight train, was there a freight train there?

A. Yes, sir, a freight train moving slowly on No. 2 track eastbound, going into Philadelphia.

Q. Which of the two trains passed under the highway bridge first?

A. The freight train.

30 Q. Now, did your train overtake and pass, your engine overtake and pass the engine of the freight train before you struck Nugent?

A. No, sir.

By Mr. Wescott:

Q. You were looking ahead, I suppose, as you came along there?

A. Yes, I had been, yes, until I applied the air and I was watching the gauge.

Q. Just one second, please; you were looking ahead, of course?

A. Yes.

Q. And you knew that they were building a bridge there?

A. Yes, sir.

Q. And you knew that there was danger connected with the work that the men were doing on that bridge arising out of the passage of trains to and fro, didn't you?

10

A. Well, that is the reason the fireman was ringing the bell to notify the men.

Q. I didn't ask you the reason he was ringing the bell.

A. Yes.

Q. You knew there was danger connected with and arising out of the situation there?

A. Yes.

Q. And you had been instructed to drift, hadn't you?

20

A. Yes, sir.

Q. And the reason you drifted was that you wanted to give these men that were under this bridge a chance to save themselves and get out of the way?

A. No, sir, I had shut off to make the station stop, you know.

Q. Oh, no, the reason—

A. If I hadn't been making a station stop, of course, I would—

30

Q. Pardon me one second; the reason you were told to drift was that you knew these men were under this bridge there and they wanted a chance to escape suffocation or being hit, didn't they?

A. Yes.

Q. And that is the reason you drifted and went

under slowly, to give them plenty of chance to escape?

A. Yes.

Q. Now, this man was right in front of you, within twenty feet of you?

A. Yes, sir.

Q. Walking on your right or left?

A. On the right.

Q. On your right?

10 A. On the outside ties, yes, sir.

Q. And walked right straight into the engine?

A. Yes, sir.

Q. Was he looking at you?

A. No, sir, he had his head down.

Q. Had his head down?

A. Had his head down this way, walking along.

Q. Where was the freight engine at that time?

A. Why, the freight engine was right down a little piece east of the station; they had just passed there
20 ahead of me—

Q. The freight engine then had got away by him down at the station?

A. Well, it was right at the station there, you know.

Q. It had got away by him down at the station?

A. Yes, and he had come over.

Q. Pardon me one second; the freight train had got away past him down by the station?

A. The engine part, yes.

30 Q. The engine part, so he escaped that easily, didn't he?

A. Yes.

Q. Then he got on the next track, on the outside of the ties, and walked with his head down right plumb into your engine?

A. Yes, sir.

Q. That is so, is it?

A. I was——

Q. That is so, is it?

Mr. Logan Gaskill: Read him the question, please.

(Question repeated.)

Q. That is true, that that man did that thing? 10

A. He walked into the engine, yes.

Q. With his head down?

A. Yes.

Q. That was in the daytime?

A. Daytime, 7.58 in the morning.

Q. In the morning?

A. Yes.

Q. And you were going a good deal slower than the freight train?

A. Well, I was slowing down, you know, to make the station stop. 20

Q. You were going a good deal slower than the freight train?

A. Yes.

Q. And the freight train was going about how fast?

A. Well, I suppose it was going about twelve or fifteen miles an hour, that is, passing the station.

Q. And you were going about how fast?

A. I was going previous to that when I had applied the brake—— 30

Q. You were going how fast?

A. I had made a reduction; I had reduced my speed down.

Q. You were going about how fast?

A. Twenty or twenty-five miles an hour west of that point.

Q. Where was the freight train when you first hove in sight of that bridge?

A. I was passing along his train.

Q. Oh, you were going by him?

A. Yes, sir; his engine, you know, was at the head end of the train, of course.

Q. Why didn't you go by him, you were going a good deal faster?

10 A. Why, I was making—getting ready to make a station stop. He wasn't stopping there, but I was.

Q. But until you struck this man you were going twenty or twenty-five miles an hour?

A. Yes, sir.

Q. The freight train was going how many, did you say?

A. I suppose it was going twelve or fifteen miles an hour.

Q. You were going twice as fast as he was, but you could not catch up to him?

20 A. I caught up to him, yes.

Q. Caught up to him but couldn't get by?

A. I didn't want to go by him, because I was making a station stop, his train——

Q. I am talking about the time of this accident; you were going twice as fast as he was, but could not get by him?

A. No, sir.

Q. And ringing the bell as hard as you could?

A. The fireman was ringing the bell, yes, sir.

30 Q. How far was the engine from the bridge when you struck him?

A. Well, it was about fifty feet, as near as I can tell.

Q. Fifty feet from the bridge?

A. Yes, sir.

Q. How far is the path——

A. Between the signal bridge and the tool house.

Q. How far is the path from the bridge that the men went up to get on the bridge to do this work—about how far?

A. I don't remember anything about a path there; I was not—

Q. He was pretty nearly under the bridge, was he?

A. He was about fifty feet west of the signal bridge, as near as I can tell, between there and the tool house.

Q. The signal bridge—what is that?

A. That is the signal bridge on the picture there, between the signal bridge and the tool house.

Q. You don't mean the wagon road bridge?

A. No, sir, the signal bridge.

By the Court:

Q. Was that where this path—or don't you know anything about the path? Did you see a path on the side that went up on the side of the bank?

A. There was a path that lead up to the pike there.

Q. Where was it regarding the entrance to that path that he was hit?

A. I don't know what he was doing at the point, whether before he was hit—

Q. No, I say, how near was he to the entrance of the path when he was hit?

A. I couldn't answer that.

Q. Or don't you know?

A. No, sir.

By Mr. Wescott:

Q. Did you ever see people go up that path?

A. No, sir.

Q. Never did? Did you know there was a path there?

A. I seen boys run up and down the bank there, but I never took notice to any path, because I wasn't interested in that part of it.

Q. Why didn't you see this man before you got within twenty feet of him?

A. I could not see him on account of the curve.

Q. Or he could not see you for the same reason?

10 A. No, sir, he had come right across in front of that freight train.

Q. Pardon me, he couldn't see you for the same reason?

A. He would have been able to see me——

Q. Pardon me, you could not see each other for the same reason, the curve?

A. The curve? No, that is what blocked it off, and the freight train.

20 Q. That is the reason you got on top of each other without seeing each other?

A. Yes, that is it exactly.

By Mr. Logan Gaskill:

Q. With respect to the speed of your train, what I want to know, what I asked before, is as to the speed of your train after leaving this highway bridge, and as you were going at the time you struck Nugent—what speed was that?

30 A. Well, I said I supposed I was going between twenty and twenty-five miles an hour. I had room to make the stop between there and the station, you see.

Q. Well, now, what I want to know is whether or not you were going any slower after you reduced to make that stop?

A. Yes, sir.

Q. Well, now, what were you going after you had reduced to make the stop?

A. Well, I was going about fifteen miles an hour then, after I had made that reduction.

Q. Now, how was it that first you overtook the freight and then the freight passed on beyond you?

A. Why, you know, my slowing down; of course, he kept on moving, that is the reason; his train was passing on while I was stopping.

10

Mr. Logan Gaskill: There is a matter of the physical conditions I overlooked.

Q. You know the physical conditions, do you, as to the neighborhood of Berwyn station?

A. Yes, sir.

Q. Now, do the railroad tracks there go through a cut?

A. Yes, sir.

Q. What, if anything, is there by way of a bridge across the railroad at the Berwyn station? 20

A. There is a bridge right there at the Berwyn station.

Q. How do passengers get from the level of the platform to that bridge if they want to cross over?

A. Walk up the steps and over the bridge and down the other side.

Q. Is there any roadway on either side of this embankment up to the highway bridge that the men were constructing? 30

A. Yes, sir.

Q. What and where?

A. A pike along the south side, the side that they working on.

Q. That is the left side as shown in the pictures?

A. Yes, sir.

Q. How close is that to this cut?

A. Well, it is right along the fence, divides the two right along the bank.

By Mr. Wescott:

Q. How high is the bank?

A. About a four-rail fence.

Q. How high is the bank?

10 A. Oh, the bank, I suppose—you mean deep?

Q. Well, how deep is the bank?

A. Well, it is about a twenty-five or thirty foot cut along there.

Q. And how steep?

A. Well, it ain't so steep on the south side; on the north side it is the steepest.

Q. How steep?

A. How steep?

Q. Yes.

20 A. Well, it is a regular sloping bank.

Q. Some banks slope more than others; I suppose this sloped perhaps more than any bank you ever saw before?

A. There was a path there I remember, a path there that led up along the pike.

Q. A path where?

A. Led up to that bridge along the pike.

Q. That is the path on your left as you were approaching the station?

30 A. On the right as I was approaching the station.

Q. On your right?

A. Yes, a path on the right side.

Q. Then you did know there was a path there?

A. I knew there was a path there, boys used that; I don't know who made it, though; I seen the path there.

Q. A pretty good path, wasn't it?

A. Well, it was used more after the men got there I suppose; of course, I didn't watch anything like that about the path, because I have got too much other to look after.

Q. Yes, and particularly when you are racing with that freight train, it going half as fast as you were going and you going twice as fast as it was going, and yet you could not keep up with it?

A. Well, he was going on while I was reducing. 10

CHRISTOPHER C. BREITAGAN, SWORN.

By Mr. Logan Gaskill:

Q. Mr. Breitagan, were you the fireman of this engine of which Mr. McFadden was the engineman?

A. I was, yes, sir. 20

Q. Do you know the physical conditions here in the neighborhood of this Berwyn station?

A. Yes, sir.

Q. And do the tracks run through a cut there?

A. They do.

Q. Is there an overhead bridge at the Berwyn station?

A. Yes, sir.

Q. What, if anything, is there in the way of a highway along the banks on either side? 30

A. I haven't quite got your question, please.

Q. Well, it is pretty general. (To the stenographer) Read it, please.

(Question repeated.)

A. Nothing.

Q. A roadway—is there any road at the top of either bank along the tracks?

A. On the south side, yes.

Q. What kind of road is that?

A. I am not familiar, but I think it is the Lancaster Pike, called the Lancaster Pike.

Q. Does that run by these two bridges, one at Berwyn station and the other that the men were building?

10 A. Yes.

Q. How can men or passengers on No. 4 track pass over on to the other side?

A. By going up the steps and over the bridge and down the steps on the opposite side.

Q. Now, do you remember striking this man Nugent on April 6, 1915?

A. Yes.

20 The Court: What were you, the conductor?

The Witness: The fireman.

Q. Were you in the engine?

A. Yes, sir, the left side.

Q. The left side?

A. Yes.

Q. Did you see Nugent before he was struck?

A. Yes.

Q. And where was he?

30 A. My earliest view of him——

Q. No, where was he when you saw him?

A. Outside of the track at the edge of the rail or edge of the ties, rather, on the outside.

Q. On the edge of the ties on the outside of the track?

A. On the outside of No. 1 track.

Q. No. 1 track?

A. Yes.

Q. How high does the ballast lift those ties above the ditch along the side of the road?

A. I judge about twenty inches, as near as I can judge it.

Q. What was Nugent doing when you saw him?

A. Walking toward us.

Q. Well, how far was he from this highway bridge when you first saw him, as near as you can tell? 10

A. Are you speaking of the bridge at the station or the bridge where he was to work on?

Q. The bridge that the gang was at work upon.

A. Well, I judge 200 feet.

Q. Was he on the ties of that No. 1 track all that time?

A. Yes, sir, on the ties, on the outside of the track.

Q. Well, now, what were you doing?

A. Ringing the bell, looking ahead.

Q. What did you do or say when you saw Nugent 20 on the track?

A. Called to the engineer to blow his whistle; kept ringing the bell at the same time.

Q. Did he blow his whistle?

A. No, sir.

Q. Why not?

A. He did not understand me.

Q. What?

A. He couldn't understand me, couldn't catch what I yelled. 30

Q. Why not?

A. Well, the sound of the injector and the engine blowing off, which is more or less customary with an engine when you shut off steam, they will always blow off a lot, carrying a good boiler pressure, it will lift a good deal and it makes quite a sound.

The injector also makes a sound, and it is very hard—and also this freight train, the noise of the freight train moving on No. 3 track, between the two together, it made it very difficult for the engineer to understand what I meant. I yelled and motioned to him, but we were too close to the man before he realized what I meant.

Q. Was your bell ringing at the time you struck Nugent?

10 A. Yes.

Q. What rate of speed had you been making before you came to this curve?

A. About forty-five miles an hour before we came on to the curve.

Q. What were you running as you rounded the curve and came to this bridge?

A. To the bridge? I judge twenty-five miles an hour.

20 Q. What were you running at the time you struck Nugent?

A. I judge between twenty and twenty-five; the brakes had already been applied and beginning to take hold pretty good.

Q. Did you have your power on?

A. No, sir.

Q. Where did you cut the power off?

30 A. Quite a distance—his power was cut off before he touched the curve, quite a distance up the line, just a little east of Doylesford station, where he cut his power off.

Q. Now, with respect to this freight train, was there a freight train there?

A. Where are you speaking of?

Q. On the tracks as you approached this bridge?

A. Yes.

Q. Where did you overtake the freight?

A. We didn't really overtake the freight any-

where; we ran by his cabin, I judge about five car lengths of the bridge is where we overtaken the rear end of his train.

Q. You mean by his cabin the rear end?

A. The rear end, yes.

Q. You mean west, before you came to the bridge?

A. Before we came to the bridge, yes, running eastward.

Q. Did your engine overtake the engine of the freight train at any time? 10

A. Not near that point, no, sir; we did later on before we reached Philadelphia, but quite a distance down the line before we overtook the freight train.

Q. Where was the engine of the freight train at the time you struck Nugent?

A. My view was cut off there and I couldn't say, couldn't answer that question; I didn't see the engine of the freight train.

Cross-examination. 20

By Mr. Wescott:

Q. Did you stop at Berwyn?

A. Yes, sir, Berwyn station.

Q. Where was the freight train then?

A. The freight train was going on by Berwyn station when we stopped, not clear of the station.

Q. Is there a station on each side?

A. Yes, sir, platform on each side. 30

Q. How many passengers did you let off at Berwyn?

A. That is more than I could answer; we never had very many to get off, but had quite a few loaded at Berwyn always.

Q. How many passengers did you have to load at Berwyn?

A. As a rule, I guess forty or fifty passengers at Berwyn.

Q. That day?

A. I couldn't answer exact on that, any more than it is customary forty or fifty—

Q. Your records would show, wouldn't they?

A. That I don't know, nothing about the record. They would have a record to that effect and could answer it better than me.

10 Q. Who?

A. The conductor's record, I say, would answer that better than me; I couldn't. I say, I would have to guess on it.

Q. Well, the freight train was going about as fast as it could go, wasn't it?

A. No, sir.

Q. Wasn't it?

A. No, sir.

Q. How fast was it going?

20 A. The freight train can go forty-five, fifty to sixty miles an hour if he had wished to do it.

Q. How fast was it going past Berwyn station?

A. I couldn't judge the freight train's speed there. I was on the side next to the freight train, and it is a pretty hard thing to do when you are running twenty or twenty-five miles an hour to judge a freight train that you are running by. We had overtook, I judge, about fifteen or twenty cars of the freight train before the accident.

30 Q. You don't know then?

A. No, I would have to guess.

Q. The freight train did not stop to let off passengers?

A. No, went right on.

Q. And you overtook it?

A. No, sir, overtook about fifteen to twenty cars of the rear portion of the freight train.

Q. After you got through loading and unloading all these passengers at Berwyn, the freight train got a good start of you, didn't it?

A. The freight train was clear of us before we left the station, yes.

Q. Yes, got a good start of you?

A. Quite a good distance down the line, I suppose.

Q. Yet you overtook it again?

A. Before we got to Philadelphia we did, where at I couldn't say exactly, don't know exactly, but before we came to Philadelphia we had overtaken the train. 10

Q. How many stops did you make between Berwyn and Philadelphia?

A. I don't recall exactly the schedule of that particular train, what stops we did have. I think we made all but Devon and Radnor, as near as I can recall.

Q. Well, if you can't recall, how far was Nugent from you when you first saw him? 20

A. I don't think it would be at least over a hundred feet distant, that is, at my earliest view of the man.

Q. And what was he doing?

A. Walking toward us.

Q. With his head down?

A. On the outside of the track.

Q. With his head down?

A. I couldn't say to that point; the man appeared to be in an upright position when I saw the man. 30

Q. Did he drop his head as he got closer to you?

A. I don't know, his view was cut off from me when I got closer, due to the length of the engine. You can't see direct across around in front of an engine.

Q. After Nugent was hid for that reason, he lowered his head?

A. I don't know, maybe he wanted to butt the engine, I don't know.

Q. Yes, I imagine that is what he was trying to do. Well, you yelled at the fireman when you saw him a hundred feet away walking bolt upright toward you?

A. No, sir, I am the fireman.

Q. Well, the engineman?

A. I yelled at the engineman, yes, sir.

10 Q. Well, Nugent had lots and lots of time to get off these ties, didn't he, before you struck him?

A. Not exactly lots of time; he wanted to think quick in a case of that kind.

Q. What, when he was a hundred feet away?

A. Well, we were coming in there at a speed of about twenty or twenty-five miles an hour from that point to him.

20 Q. More than that; you were going at a speed of twenty or twenty-five miles an hour a hundred feet away and he was on the outside sleeper there?

A. The outside of the track.

Q. Well, all he had to do was to step off?

A. That is all.

Q. Instead he went right on into the train, that is correct, is it?

A. I don't know whether the man kept moving or not; he was walking directly toward us the last I saw of the man. When I first saw him he was walking toward us, appeared to be in an upright position.

30 Q. How far were you from him when you last saw him?

A. I judge thirty feet.

Q. And he was still walking straight at the train?

A. Yes, sir.

Q. And you were still ringing the bell?

A. I guess my view would have been cut off at

almost fifty feet in a case of that kind, on the curve there.

Q. Well, the curve had a good deal to do with your ability to see the man?

A. Yes, sir, not alone the curve, but the freight train moving on No. 2 track cut our view short.

Q. Had it anything to do with his ability to see you?

A. No, sir.

Q. Nothing at all? 10

A. Yes, to a certain extent it cut off his view of us also, but he had the same ability to see me and see me quicker than what I saw him, that is, to see the engine.

Q. Exactly, and if he was out on the outside tip end of the sleepers he could see further, couldn't he?

A. I should think so.

Q. If he was in the middle of the track he could not see so far, could he?

A. He had the distance of the engine—— 20

Q. Pardon me; if he was in the middle of the track he could not see so far, could he?

A. No, sir, not at that point with them conditions.

Q. And if he happened to be on the ties on the other side he could not see so far?

A. On the inside, you mean?

Q. Yes.

A. He couldn't see near as far.

Q. So that to give him the longest view, the longest vision down the track, he had to be right 30
over on the tip edge of the ties?

A. Exactly.

Q. Just where he was?

A. Yes.

Q. Walking straight at that engine that he could see?

A. Yes.

Q. That is a fact, is it?

A. Yes, sir.

Q. Did he seem to be asleep?

A. The man appeared to be in an upright position.

Q. Was he drunk?

A. That is more than I would say. It is a serious thing to talk of that with a man; you wouldn't know, you couldn't see the man stagger in no way; the man
10 appeared to be walking upright.

Q. Then he probably was not drunk as far as you could judge from his walking?

A. I haven't the least idea that he was.

Q. And do you imagine he walked in his sleep?

A. I shouldn't think so.

Q. So if he was not drunk or walking in his sleep either he had a good view of you a hundred feet away and walked deliberately right into the engine?

A. Yes; whether the man got bewildered when he
20 got close to the engine I couldn't say.

Q. Whether he got bewildered?

A. It might be possible.

Q. Do you imagine he was so bewildered he wouldn't know whether to step off of these ties or not out of danger?

A. Oh, he must have been stepping out when we hit him, because we hit him on the right chest.

Q. And then he did step out just in time to get hit in the chest?

30 A. He stepped out about right——

(Question repeated.)

A. That is where the pilot caught him, right in the chest, by the looks of it, the way we looked at him.

Q. Now, how fast were you going when you came under that bridge?

A. I judge twenty-five miles an hour approaching the bridge; under the bridge twenty-five miles an hour.

Q. Twenty-five miles an hour?

A. Yes, under the bridge.

Q. How fast was the freight train going?

A. I couldn't judge the freight train's speed after that point; I was right next to the freight train. 10

Q. Were you gaining on the freight train all the time?

A. Up to that point we were, yes.

Q. How do you account for the circumstance that this man got over ahead of that freight train which was ahead of you?

A. Yes.

Q. The freight train was ahead of you?

A. Yes, approaching that point.

Q. And then that he walked on the outside of the ties right up into your engine? 20

A. Yes, sir.

Q. How do you account for that?

A. I couldn't answer for his ends, his walking there or beyond the bridge over ahead of that train, I can't answer for that at all; all I can answer for—

Q. Now, one other question and I will be through. You knew this was a place of danger with these men working on that bridge, didn't you?

A. Yes. 30

Q. And for that reason you were instructed to drift when you came there?

A. Yes.

Q. How fast will that train go when it is drifting?

A. That depends on the speed you are running when you shut off. That is down grade there.

Q. Then you were not instructed to slow down, just to drift?

A. In approaching a point of that kind— I can't recall how the orders was written in that case—we were to beware of men working on the scaffolds under that bridge and not use steam while under the bridge. That is due to—you may suffocate a man; he may be overcome with the gas, may drop down on the track, that is the cause of that.

10 Q. When you drift do you shut off steam?

A. Throttle the steam and put on the blower as well to raise your smoke.

Q. To raise the smoke?

A. Yes; to reduce your smoke. If you wouldn't put on your blower the smoke would come out in a heavy volume.

Q. What is the object in drifting in order to save people from gas and smoke, I don't understand you.

20 A. Well, the exhaust of an engine going in under—that is, a heavy exhaust of an engine while working,—going in under a bridge, it would be sufficient to maybe overcome the men.

Q. When you drift you stop all that, do you?

A. When you are not using the throttle you are not throwing that heavy exhaust out of the stack, but by having the blower on you are putting a certain amount of steam out of your stack, enough to reduce the momentum of your smoke.

30 Q. The object of your instructions to drift, if I understand you, was to prevent the issue of smoke and gas so as to hurt these men under the bridge?

A. Yes, sir.

Q. And not for the purpose of reducing the speed?

A. Well, I couldn't say on the speed question there in regard to that either, no, sir, I can't say

to that. Of course, our speed would naturally be reduced at that point, whether there was a bridge there or not, because we were going into a station, which we have to prepare for a station stop; to come in there under full speed to that point there and make your station stop, no man could do it, on them there trains.

Q. Then what was the object of instructing you to drift?

A. We weren't personally instructed to drift. 10
There is an order always put up to that effect. Men, painters, anybody working on bridges that way, that is using a scaffold, they always put up an order to that effect, that the men should shut off steam in going under the bridge.

Q. You knew men were walking back and forth over that track carrying material, going to their work, didn't you?

A. No, sir.

By Mr. Logan Gaskill:

20

Q. One matter I overlooked. Did you know there was a track gang or did you see the track gang working on this track at this time of this accident?

A. Well, on the curve of the track men was working, yes, I judge, forty or fifty feet west of where the man was hit, the track men had been working.

By Mr. Wescott:

30

Q. What was the distance from the bridge to the station where you stopped?

A. As near as I can judge, I think four hundred feet, four hundred and fifty.

Q. Four hundred feet?

A. Four hundred feet from the bridge where these

men were working to the station where we make our stop; that is, not to the upper end of the platform, but where we make our stop in the station; we always pull well down into the station.

FRANK LUCAS, SWORN.

10 By Mr. Logan Gaskill:

Q. Mr. Lucas, are you in the employ of the Pennsylvania Railroad Company?

A. Yes, sir.

Q. Were you in the employ of the company on April 6, 1915?

A. Yes, sir.

Q. And what was your job?

A. Assistant foreman on track repair.

20 Q. Assistant foreman of track repair?

A. Yes.

Q. Were you working with a gang of men in the neighborhood of this curve and bridge there at Berwyn station on April 6, 1915?

A. Yes, sir.

Q. Now, I show you a picture, Exhibit P3; you recognize the conditions shown there? This is the Berwyn station down here where you see this brick walk, and here is a freight house over here?

30 A. That is the package room.

Q. All right; that is the third name for it. Here is the overhead signal bridge and here is the high-way bridge?

A. Yes.

Q. And there is the curve beyond. Whereabouts were you working with your men?

A. Well, I had men working from the bridge east.

Q. From this bridge where the men were working east?

A. On the Lancaster Pike bridge, what we call Lancaster Avenue.

Q. Were you and your men working on track No. 1 or one of the other tracks?

A. Between 1 and 2.

Q. Between 1 and 2?

A. Yes.

Q. Now, were your men scattered out or were they working in a bunch? 10

A. One rail in length, each of them.

Q. Do you mean that the men were about a rail length apart?

A. Yes, sir.

Q. Now, where were you stationed, nearer the highway bridge or the Berwyn station?

A. Oh, nearer the highway bridge.

Q. Nearer the highway bridge? 20

A. Yes.

Q. And what were you doing while your men were at work there?

A. Watching.

Q. Watching?

A. Yes.

Q. And what were you watching for?

A. Watching for the trains.

Q. And did you see any trains coming before Nugent was struck? 30

A. Certainly, the freight was going by there and I blew my whistle to call the men out.

Q. When you blew your whistle, where did the men go to?

A. Right out in the ditch, outside of the railroad, outside of the track.

Q. Outside of the track?

A. Yes.

Q. Now, did you see the passenger train come?

A. Yes, but that was a little later after I had my men off of the track. I seen the passenger come under the bridge, and I looked down to see if any men was on the track, my men, you know; there was none on. I seen a fellow walking up the side of the signal bridge, he was walking up, and I took
10 my whistle and blowed again and make a motion with my hand, but he didn't see me. I blowed the whistle but he didn't see me..

Q. What did your men do?

A. The men was out in the ditch.

Q. Could you tell whether they saw Nugent?

A. Why, certainly.

Q. How do you know they saw him?

A. Why, a fellow by the name of Domenico Bareccio, but he isn't here; I don't know where he
20 is; he left the employ.

Q. What did he do?

A. He was in the ditch; he was about back to where this—to where Nugent was thrown off.

Q. Now, what did you hear him do, Bareccio?

A. I didn't hear him say—couldn't hear him say anything, but he told me afterward —

Q. No, you can't tell us that. Did you hear any of your men say anything?

A. Oh, everybody was holler'ing. I heard the
30 man that was near me, you know, he was right up to the tool house; but of course the rest were all holler'ing and talking, but I couldn't hear it.

Q. Now, when you saw Nugent, how far away from you and your men was he?

A. Well, I saw Nugent in front of me where I was standing, and he was past the side of the signal bridge, west of the signal bridge, going west.

Q. Now, whereabouts on the track was he when you saw him?

A. Right on the end of the tie outside the south rail.

Q. On the end of the ties outside the south rail?

A. Yes.

Q. On No. 1 track?

A. Yes.

Q. Now, did he stay on the outside of No. 1 track on those ties all the time you saw him? 10

A. Yes, sir.

Q. Did you see him at any time down in the ditch?

A. No, sir.

Q. Did you see him at any time over here on No. 4 track?

A. No, sir.

Q. Did you see him walking across the four tracks?

A. No, sir. 20

By the Court:

Q. What was he doing on those ties?

A. Walking, walking toward me.

Cross-examination.

By Mr. Wescott:

Q. How far were you from Nugent when you first saw him? 30

A. Less than 200 feet.

Q. And he was walking on the out edge of the railroad ties?

A. Yes.

Q. How far did you see him walk on the out edge of the railroad ties?

- A. I saw him outside of the signal bridge there.
- Q. How great a distance did you see him walk?
- A. He was 150 feet east before he got hit.
- Q. You saw him walk 150 feet east?
- A. Yes.
- Q. On the out edge of the railroad ties?
- A. Yes.
- Q. Did he fall off the railroad ties any time?
- A. No, sir.
- 10 Q. Stuck to the edge all the time?
- A. Yes, walked right along.
- Q. Walked 150 feet right into that engine? You saw him walk into the engine?
- A. Yes, I seen him too.
- Q. You still work for the railroad?
- A. Yes.
- Q. Have you people been talking about this thing to each other?
- A. No, sir, I didn't know anything about it until
- 20 last evening eleven o'clock I got word to come over.
- Q. Last evening at eleven o'clock was the first you heard of it, eh?
- A. I heard of it last Thursday, but I did not come over.

By Mr. Logan Gaskill:

- Q. What has become of your men that you had on
- 30 April 6, 1915, do you know?
- A. Why, they quit and scattered away.

DEFENDANT RESTS.

BOTH SIDES REST.

Mr. Logan Gaskill: I renew my motion and ask for a direction of a verdict for the defendant on the grounds that there is no negligence on the part of the defendant, and contributory negligence on the part of the decedent, and that he assumed the risk of this accident.

The Court: The motion will be denied and an exception noted. 10

(Exception noted for the defendant.)

CHARGE OF THE COURT.

LLOYD, J.:

20

Gentlemen: At the inception of your services here it is proper for the Court to state to you that you are part of the machinery devised by the law to settle disputes between parties. You take substantially the same oath when you are sworn as juror to perform your duties with fidelity, and you swear particularly in that oath that you will find your verdict according to the evidence; in other words, you will render a true verdict in accordance with the evidence—the same duty, I say, which the Judge 30 substantially takes to administer his office with the same fidelity to his duty and to his oath, that you are expected to, and vice versa. So that you see at once that you are not only a most important part of the administration of justice, but you are also a part of the administration of justice to whom is

given wide powers and very serious responsibilities. Cases are brought into court because the parties cannot adjust them themselves for some reason or other, or do not adjust them themselves, and then you take up the responsibility of deciding precisely between the two which is right and which is wrong.

This case, gentlemen, comes before you and it happens to be that it is between a deceased man's estate and a railroad company, but of course, it is to
10 be viewed exactly the same as though it were between two individuals or two railroads or two companies or two any other legal entities. You are simply to administer the ruling, the decision that you finally make in the case, based wholly upon the evidence as it comes from the witness box.

In this case, the plaintiff claims that Nugent, the deceased, lost his life through a negligent act on the part of the employees of the defendant railroad company. The undisputed circumstances to a given
20 point are that Nugent was one of a number of men who were employed doing work on an overhead road bridge, a bridge over the railway track upon which apparently the public was supposed to travel. He had been working there for about three weeks when the accident happened which killed him instantly. It seems that he had been coming to the place of his work on the train to the station which was just a little way nearer Philadelphia than the bridge itself, and on this occasion he came by train and was some-
30 what late in getting to work. From that point on, perhaps there is some divergence in the testimony, certainly in its most material parts, and here is where you will be called upon to determine what the true facts are.

The plaintiff claims that the deceased got off the train, that he went to a tool box which was on the

station platform, and got out of it a pair of overalls; that he then started up on the right-hand side of the track in the ditch or path alongside of it; that he walked up that side for a considerable distance until he came to a bridge which was known as a signal bridge; that after passing that some little distance he crossed over; that approaching him was a freight train, that before he reached or stepped upon the tracks at all that he used observation as to what was in the way, that he looked; that as he got between the two tracks, that is, the two sets of tracks,—I apprehend is meant by that, between the second and the third track,—he again stopped and looked and then started to cross, and that thereafter within a comparatively short space of time he was struck by a passenger train which was upon the outside track and killed apparently instantly. That is the statement on behalf of the plaintiff in substance as to how this accident happened. 10

The defendant's statement is that the deceased came upon the track at some point which they do not seem to know, but the first point at which he was seen was, according to their testimony, some distance away from this passenger train walking upon the outer edge of the ties or the outer end of the ties toward the train itself. The fireman of the train which struck him says that he first noticed him in that position a hundred feet away. The assistant foreman of the railroad laborers who were working there said he noticed him still further away from the train. The engineer said that he first noticed him when about twenty feet from the train. They all testify in substance that he was going on this outer edge of the ties with his face or with the front part of his body toward the approaching train, and that in that position, some of them 20 30

saying looking or with his face up and others with his face or head down, that he approached the train without paying any heed at all to his own safety, and that he was struck and killed.

Well, gentlemen, I don't need to say to you that no duty which this man was called upon to exercise in his employment required him to walk upon the ties of that railroad track facing the engine. If he did that, of course, he was so clearly guilty of negligence as to preclude any recovery here on behalf of his wife and children. You see from this that the defendant's answer is partly based upon the deceased's own conduct. Their contention, however, gentlemen, is largely, principally, perhaps certainly equally, that the defendant itself did not fail to perform its duty in any regard with respect to the deceased man, and here comes in what may be the law of Pennsylvania.

There is testimony in the case that when an employee working lawfully on a railroad in the performance of his duties is required to be in a position of danger with respect to moving trains, that there the railroad company owes him a duty of reasonable care to avoid injury to him; and it is claimed in this case on behalf of the plaintiff that there was adopted a custom or rule for the guidance of those in charge of the trains upon this occasion, that they should let their engines drift as they approached this bridge. Various reasons have been given for that practice, and it further has been testified in the case that the deceased knew of this rule.

I say, the defendant's answer to all this is that there was no violation of any duty, and secondly that the plaintiff heedlessly walked into this train without paying any regard to his own safety. Now, gentlemen, it is only for negligence under the

circumstances that the defendant is answerable. If the death of the deceased man was due alone to the negligence of the defendant company in the failure to exercise reasonable care toward him, if that be the rule in Pennsylvania, while he was lawfully using the tracks in the course of his employment, then, of course, a liability attaches in that event.

The Court will follow, gentlemen, the rule which counsel in the case have argued to you as to the measure of damages in a case of this kind, if you 10
conclude that the defendant is answerable. Under the law of New Jersey, under what is known as our death act, the recovery is for the benefit of the next of kin, and that for the pecuniary loss which has been sustained by the next of kin through the taking off, in this case, of the father and husband. It has been testified in the case that thirty-two years was his age. The jury would determine, of course, what expectancy of life and benefit there would accrue to this family, and I know of no more difficult 20
question for a jury to settle than that one. No man knoweth the day or the hour; it is all without our knowledge as to the day when we will terminate our physical existence. It is also largely in conjecture as to how long those who are dependent may live, and how long the relations of life may continue; even though death does not intervene to break them up, many things happen; so you see you have a number of difficulties, a good many problems in reaching a conclusion as to how long this family 30
would derive the benefit, assuming that the father worked, had plenty to do, and earned wages, and was able to turn them over to his family in large measure.

But, gentlemen, you would have another problem in this same connection. An illustration was given

to you by which you could deduce a verdict of \$10,000, and I may say to you that that was based upon a wrong principle. It was suggested to you that you might take the sum of money which this family would derive from the husband and father during the entire course of their relationship and add that sum together and then award such a sum to his widow. I do not think counsel meant that; I think he was carrying his illustration without in-

10 jecting into it or without placing into it another very essential element to which he had already referred, namely, the present worth of such loss. You can see at once that in the language of slang, the party would be getting both the penny and the cake if they should get \$10,000 in a case of that kind on the assumption that those were the correct factors for the problem, because, you see, that does not give the present value but it gives the whole thing, it gives the principal and the income on it at once. In the

20 case of the family, if you accept the illustration that the family would get so much money for a period of years during their relationship—and this is only by way of illustration; it is not intended to be helpful to you at all in determining what the facts are, but if such were the facts you see at once that the family would derive such sum of money only over a period of years, and we all know that it does not take very many years for money to double itself by reason of compounding

30 the interest. So the law makes you take into consideration the question of the present value of the loss which they sustained, and in determining that you see you have got to discount the total sum that would be received by reason of the income which would be derived from it; as I have already said to you, they would get both the principal sum and the

interest on it as well. In the case of the man, if he were living, whatever sum is paid from month to month would be coming in in the future continually, so that they would not receive the capital that this jury is called upon to award, if it reaches the point, of course, of awarding damages at all.

So the best, gentlemen, that I can say to you is that you are to take these elements into consideration, to determine what was the fair present value of the taking off of this man at the time of his death. 10
Now, as I have already said, there are a great many elements that enter into the uncertainties of life. We have known of such things as families being separated; we have known of such things as other members dying; we have known of the wage earner being instead of a factor of service and maintenance himself becoming dependent. He may die, the wife may die and the children may die; all of these things enter into the elements of doubt, but they are, nevertheless, legitimate matters for your consideration, 20
and so upon the other side, the probabilities of life and the probabilities of a continuance of relationship are all matters proper for you to take into consideration under our death act, and it is for you to say, if you reach that point, what was the actual money loss without placing in it any question of bereavement, because the law does not award damages for that feature; but it is for you to say what the present value of the loss is based upon its present value, speaking, of course, as of the time of the 30
death. I think that is all I have to say to you.

Mr. Gaskill: If the Court please, I ask an exception to this statement in the course of the charge with respect to the way Nugent was walking: "Some say with his face up." Of course, counsel argued that, but I don't think any witness testified to it.

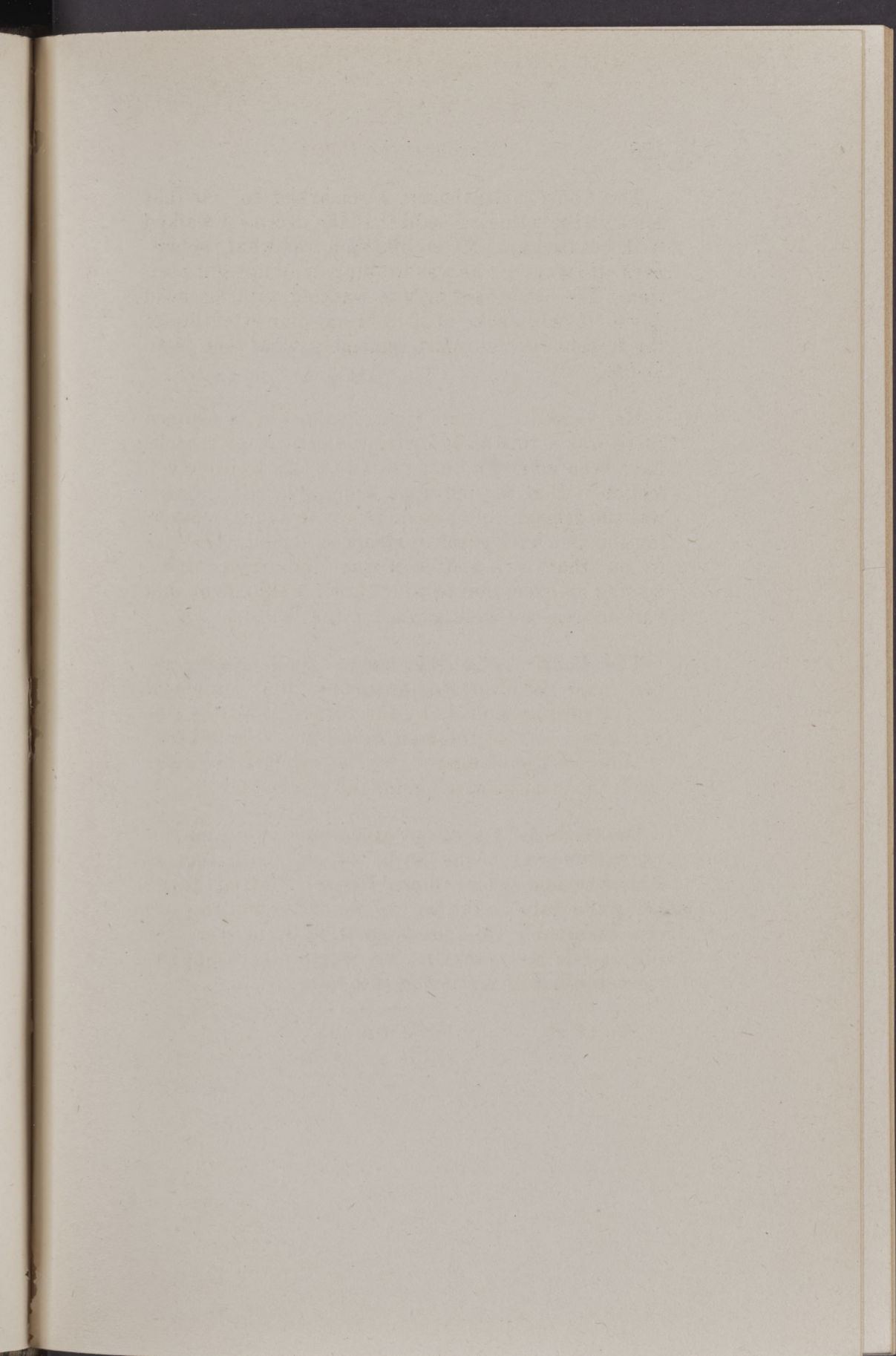
The Court: Gentlemen, I remarked to you that some of the witnesses said that the deceased walked with his face up. My recollection was what the witness said was that he was walking in an upright position. The other said he was walking with his head down. I only spoke of it to bring your attention to the testimony; you must remember what was testified to.

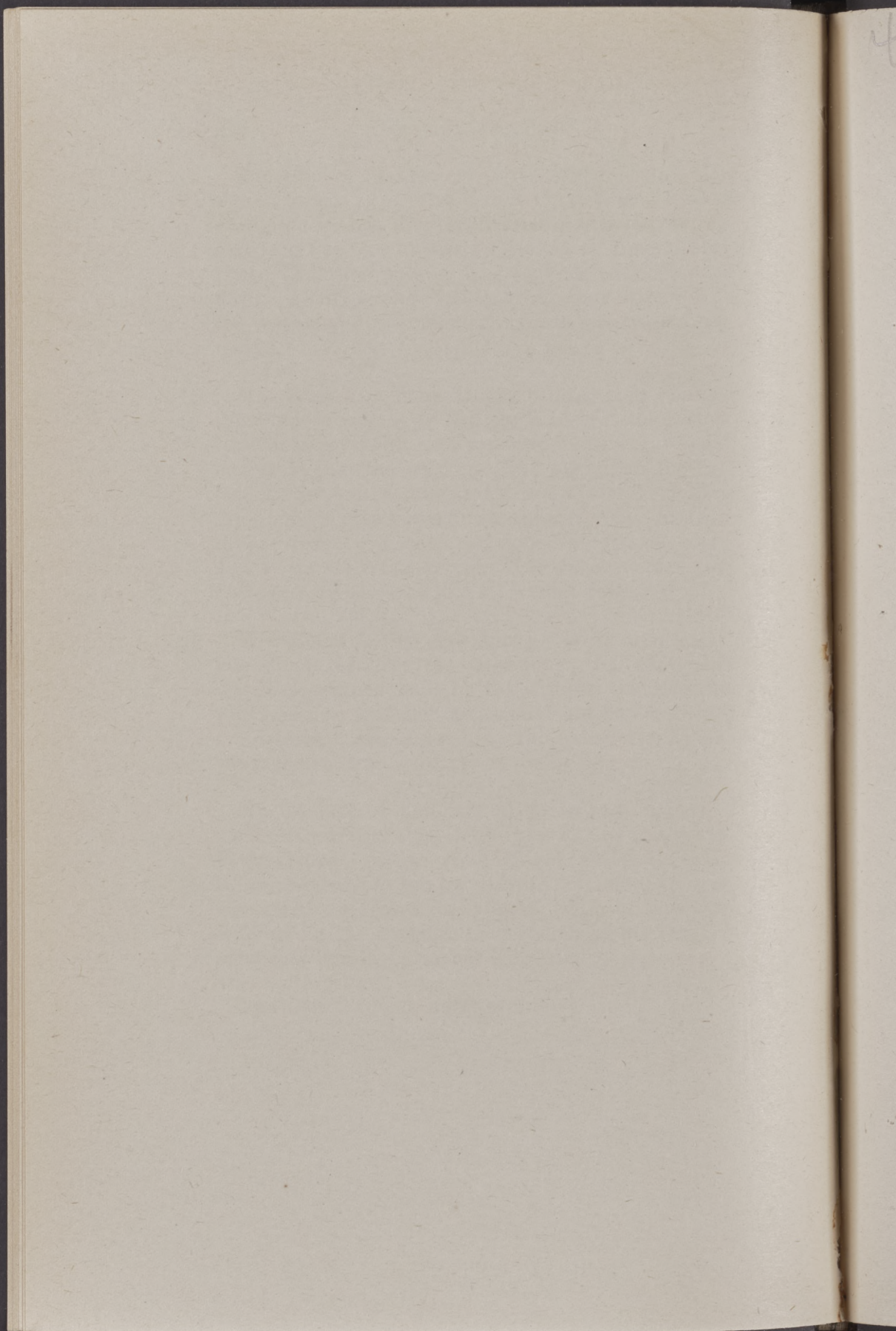
10 Mr. Gaskill: Your Honor said, "It is claimed there was a rule as to drifting and various reasons have been given for that practice." Now, my recollection is that the only one who explained the rule was the fireman, and he said it was to avoid smothering the men with gases or steam or smoke. It seems to me that is a matter of some importance and I wanted an exception to your Honor's statement that various reasons were given for that rule.

20 The Court: (To the jury) Well, gentlemen, you must recollect the testimony, that statement was in substance made by the witness, that the rule was given so that the men would not be smothered or disturbed, endangered, by the exhaust or smoke when the engines went under the bridge.

Mr. Gaskill: I want an exception to that part of your Honor's charge with respect to the law of Pennsylvania where your Honor referred to its
30 being the duty on the part of the defendant to exercise reasonable care for Nugent while he was lawfully using the tracks in the course of his employment and liability attaches if it fails.

The Court: Note an exception.





New Jersey Court of Errors and Appeals

Joel W. Fithian, Adminis-
trator of Philip Nugent,
Deceased,
Plaintiff & Defendant-
in-Error,

vs.

Pennsylvania Railroad
Company,
Defendant & Plaintiff-
in-Error.

Action at Law.

BRIEF FOR PENNSYLVANIA RAILROAD COMPANY.

I.

Philip Nugent was in the employ of Gibbs and Hill who were engaged in erecting a highway bridge over the railroad tracks near Berwyn station in Pennsylvania. On April 6th, 1915, he failed to go to his work with the other employees of the gang and while walking by himself from the Berwyn station along the railroad tracks to the bridge, where the gang was working, he was struck by a train and killed.

Numerous errors are assigned, covering the improper admissions of evidence, failure to non-suit the plaintiff or direct a verdict for the defendant, as well as an error in the charge to the jury.

The complaint stated in paragraph one, that Gibbs and Hill were engaged in erecting overhead wiring for the conduct of electricity along the tracks of the company for the company—the defendant. This was admitted in the answer, but on the trial it appeared that such was not the fact and both parties were incorrectly informed. The facts as proven were that Gibbs and Hill were engaged in constructing a highway bridge over the railroad tracks—which at that place passed through a cut. It was not shown whether Gibbs and Hill were under contract with the municipality or the railroad, and no implication arises that the contract was with the railroad company. Under the plaintiff's peculiar theory of the law and right to recovery, the proof of that fact was important and the burden should have been carried by him. We submit that no admission can be taken from our answer inasmuch as the facts were totally different from those stated. Only a railroad company operated by electricity would install wires for carrying electric current along its tracks, while it is quite as likely that the municipality was constructing the bridge as that the railroad company was doing so.

The complaint states that in the performance of his duties, Nugent and the other workmen were necessarily required to frequently cross over and walk along the tracks of the defendant at or near the place of work. It was upon this allegation of fact that the case was tried and sent to the jury, although it was not proven to have been necessary on the part of the workmen, but merely a practice—

necessarily unlawful. Evidently counsel tried to make the actual facts establish a case according to the original, but mistaken notion.

Upon the premise that it was necessary for the workmen to frequently cross over and walk along the tracks of the defendant at or near the place of work, the complaint alleges that it was the duty of the defendant to give adequate warning of the approach of trains passing along the tracks at that place; yet the defendant caused a passenger train to approach the said place at or near the hour of eight o'clock in the forenoon and negligently failed to give any signal of the approach of the train or to reduce the speed of the train as it approached said place, whereby Nugent was struck and killed.

The grounds of defense are that there was no negligence on the part of the defendant, but that there was contributory negligence on the part of Nugent by walking upon and over the railroad tracks of the defendant without looking and listening. Also that he was a trespasser. Upon trial a verdict for \$5,000 was rendered and judgment entered.

II.

No witnesses were called for the plaintiff to prove the character of the contract under which Gibbs and Hill were working, or that any rights or privileges were given under it to the workmen of Gibbs and Hill. Nor were any witnesses called to show that the physical conditions were such that "it was necessary" for the workmen to cross over and walk along the tracks, as might have been the case if the contract was as stated in the complaint.

We submit that whether or not the bridge was

being constructed for the railroad company or the municipality, the railroad was private property and a place of great danger. The bridge crossed the main trunk line of four tracks, just outside of Philadelphia. It was the duty of Gibbs and Hill, if they permitted their workmen to walk along the tracks or to walk back and forth across the tracks in the course of that work, to protect their men by watchman or otherwise, as well as to secure authority from the defendant. The failure of Gibbs and Hill to do so indicates that the men trespassed on the railroad, and that the practice of the men in acting as they claim to have done was negligence, or the creation of a risk which they assumed.

Three employees of Gibbs and Hill by the name of Joseph Powers, Thomas Doyle and Gerald O'Brien testified to the facts upon which the plaintiff relied. They stated that in coming to work it was their habit to leave their trains at Berwyn station and walk up the right side of the tracks—about 200 paces—to the bridge and there cross over the tracks to take a pathway up to the embankment on the left-hand side. How long the path up the embankment had existed was not shown. It may have been made by the men constructing this bridge. If it was an old path that fact should have been shown by the plaintiff. These men stated there was no path on the right-hand side because the embankment was steep. O'Brien stated (page 70) that he wouldn't make a path up the right side, for he didn't have to; and when asked whether he was willing to take the chances of walking back and forth across these four tracks rather than make a path up the right side stated, "Well, I didn't see no path there and I wasn't going to make it."

These employees of Gibbs and Hill testified that

Nugent was late that morning, and about eight o'clock they saw him at the Berwyn station, saw him get some things out of a tool box and walk up the right-hand side of the tracks to the place where they usually walk back and forth across the tracks by the bridge, and then he started to cross over, and did so, stopping and looking for the approach of trains and was struck by a train running into Philadelphia. That this train was on the far track and was obscured by a freight train running in the same direction on the inside track next to it. That there was a curve in the line on the far side of the highway bridge which also obscured the approach of the train. The facts show very clearly that Nugent did not reach the neighborhood of the highway bridge when he was struck, but we may pass this as having been found in his favor by the jury.

III.

Much testimony was produced by the plaintiff over the objection of the defendant, of a highly prejudicial character to the defendant, with respect to the operation and movement of trains on these tracks under this bridge and its vicinity, upon the theory that the workmen of Gibbs and Hill were required by their work to walk along the tracks and back and forth across the tracks. The ostensible purpose on the part of the plaintiff was to show that the train which struck Nugent was running at a high rate of speed; while, under orders, it should have been running very slowly at that point and its vicinity for the protection of the employees of Gibbs and Hill.

Two of the three employees of Gibbs and Hill who

testified for the plaintiff, stated that their foreman told them that instructions had been given by the railroad company to its men *to drift under that bridge*. Counsel's assumption was that the drifting was done so that the men could escape being hit (page 93, line 35), and that the trains drifted and went slowly to give the workmen plenty of chance to escape. (Bottom page 93 and top of page 94.) The jury so understood the plaintiff throughout the case.

Objection was made by the defendant to this line of testimony on the ground that such evidence did not properly and lawfully prove the existence of the rule, and that only the terms of the rule would show what it was and how it applied—if at all—to the facts in the case. Our objection was overruled (page 27) upon the promise of the plaintiff to follow this testimony by proof that the instructions were acted upon by the railroad.

See the first, second and third grounds of appeal, and testimony on pages 27, 59 and 60, respectively.

It appeared from the testimony of the employees of Gibbs and Hill that at this time they were at work on scaffolding hanging from the bridge, erecting screens under the bridge for the purpose of protecting certain wires; and it appeared from the testimony of the engineer and fireman of the train which killed Nugent, that the orders actually given them for operating under that bridge were that they were to beware of men working on scaffolds under that bridge; to drift and not use steam so as to avoid suffocating the men or causing them to be overcome with gas (page 93, line 35; page 112, line 3). The bridge gang were avoiding this very fate. (P. 43, l. 35.)

After the motion to non-suit had been made and refused (page 86), a motion was made to withdraw

a juror on the ground that the testimony, that the foreman told the men that the trains would drift under the bridge, would be traced directly to the company, had not been done: That the Court had overruled our objections on the theory that the instructions would be brought home to the company, but that the plaintiff had failed to do so, whereby the defendant is prejudiced. The Court held, however, that there was proof that the company had observed the rule alleged to have been repeated by the foreman of Gibbs and Hill to his men, and that the fact that under the testimony the trains had usually drifted under the bridge was proof of the creation or the adoption of that rule. The Court refused the motion, promising to deal with that fact by caution to the jury in his charge.

The Court completely failed to caution the jury; and, on the contrary, made so an erroneous a statement of fact to the jury that upon our taking an exception thereto (see page 126), he withdrew that statement and stated to the jury (page 126):

“The Court: (To the jury) Well, gentlemen, you must recollect the testimony, that statement was in substance made by the witness, that the rule was given so that the men would not be smothered or disturbed, endangered, by the exhaust or smoke when the engines went under the bridge.”

We submit that this statement by the Judge puts a totally different phase upon the ambiguous, unreliable and unlawful testimony given by the plaintiff with respect to drifting under the bridge. As an actual matter of fact the trial Judge permitted the jury to render a verdict upon an issue not stated in the pleadings, and not only not proven by the plain-

tiff but disproven by the defendant. It cannot be said that under this charge the jury understood that the rule was given solely for the purpose of protecting men on the scaffolds from steam, smoke or gas, and not for the purpose of protecting men walking back and forth across the tracks and along the tracks. The mere introduction for such testimony, and the alleged violation of such a rule, upon an issue based upon the necessity for the workmen of Gibbs and Hill to walk back and forth across the tracks and along the tracks was not only confusing to the jury, but made them believe that the alleged violation of this rule was the cause of Nugent's death. Certainly, in view of the finding for the plaintiff, it cannot be stated they did not find that the alleged violation of this rule was quite as much the cause of Nugent's death as the failure to sound signals. The testimony of the employees for Gibbs and Hill that this train was running at the rate of forty-five miles an hour, and that the train was under power when it passed under the bridge and struck Nugent, demonstrates that the plaintiff was relying upon the violation of the rule as being an important factor in taking the case out of the hands of the Court. The least the Court could have done was to withdraw that testimony from the jury.

The foregoing argument is sufficient basis upon which to present the eighth ground of appeal—the refusal of the Judge to non-suit the plaintiff (page 81), on the ground that Nugent assumed the risks incident to his employment and that death came by one of the risks which he had assumed. That he was guilty of contributory negligence because he walked up the tracks and crossed over them, and that he is not excused from contributory negligence by the testimony that he looked and listened while cross-

ing over the tracks. That he could have gone up the bank on the right side of the tracks, the side he was on, notwithstanding the fact that he and the other men had not made a path for themselves up that bank.

IV.

The trial Judge admitted incompetent evidence—see grounds of appeal, 4, 5, 6 and 7, from a Philadelphia lawyer by the name of Oliensis (pages 70 to 80) as to the rule in Pennsylvania as to the duty of a railroad company to persons *permissibly crossing* railroad tracks or *called upon to cross* railroad tracks. When the question was first put (page 70)—what is the rule in Pennsylvania with reference to a person who is permissibly crossing railroad tracks, we made objection as incompetent, irrelevant and immaterial and also because it involves a disputed question (an unproved matter) that of one permissibly crossing railroad tracks. The Court thought the question was not complete, and counsel put the question again in substantially the same form, and objection was made on the same ground as before, and that this was not the best proof of the rule. The latter point is not pressed at this time. The question was repeated to the witness, and he answered it (see page 73) giving the rule as to railroad crossings and as to permissible crossings, *i e.*, ones which by the lapse of time and usage of the public have become permissibly recognized as a crossing.

The Court followed that answer with this more pertinent question (page 73):

“Q. What is the situation where men are
“working on and about a railroad and in the

“performance of their duties they are called
 “upon to cross the tracks?

“A. When they are working —

“Q. What obligation is there resting on the
 “railroad under those conditions?

“A. Under those conditions, the railroad
 “must exercise the reasonable care required
 “under the circumstances.

“Q. Well, is there any rule as to what reason-
 “able care is?

“A. No, the question of reasonable care in
 “Pennsylvania is purely a mixed question of
 “law and fact. The law is abstract and the
 “facts must be fitted into each case. The
 “greater, that is, the more frequent the circum-
 “stance at which the people are there, the
 “greater the care that must be exercised by the
 “railroad. If a man, for instance, works on the
 “track as, for instance, fixing up things or
 “doing things that require his presence right
 “close to the track or upon the track, the care
 “to be exercised by the railroad must necessar-
 “ily be greater than where he has simply to be
 “there occasionally in the performance of his
 “work. And then in another case, where he
 “don’t have to be on the track, but in the per-
 “formance of his work he has occasion to cross
 “the track, then, of course, the care is according
 “to the circumstances. It is a question for the
 “jury to determine in view of this law.

“Mr. Joseph Gaskill: If the Court please, I
 “move to strike out the whole of this witness’s
 “testimony, it being incompetent, irrelevant
 “and immaterial.

“The Court: It is intended to urge the ob-
 “jection already made, or is there something in

“the answer itself which you think is incompetent?”

“Mr. Joseph Gaskill: In addition to the objection already made, it seems to me that the testimony of the witness does not throw any light whatever upon what the law is in Pennsylvania and that he practically at the end of his answer has said that it is a jury question which we knew from the outset.

“The Court: No, I don't think I can strike it out. Note an exception.”

We submit that these questions and these answers were improper and illegal, and that they failed to take the case out of the motion to non-suit or direct a verdict for the defendant, because the question is full of statements that were not proved to be facts in the case. The workmen of Gibbs and Hill were not working on or about the railroad. They were working on the construction of a highway bridge over the railroad. Moreover there is no proof that in the performance of their duties they were called upon, *i. e.*, required or compelled to cross (and particularly to walk along) the tracks.

Doyle on cross-examination stated that the material was unloaded from the cars on the right side of the tracks and they carried all their material across the four tracks and up the left side, and denied that a good deal of the material was swung by derricks up into place. Realizing the folly of this testimony and his liability to punishment, he then admitted that the girders were swung into place by derricks from the trains, and that all the heavy material was swung by derricks to the top of the bank and that only the lighter stuff was carried up. Assuming this latter statement to be true, the points

stated in the early part of our brief still apply, viz., that the workmen of Gibbs and Hill had no right on the tracks either in walking along them or in walking across them, which the company was bound to respect, but that if Gibbs and Hill created or permitted that practice by their men, they were bound to protect them. The company did its full part when it issued and enforced a rule which prevented the smothering of the men who were working on the bridge or on scaffolds hanging from the bridge.

Moreover the answer of Oliensis (page 74) does not govern the liability in this case, for this man was not working on the tracks or doing work which required his presence close to or upon the tracks. This was not a case where deceased had "occasion to cross the track" as suggested in the answer of the witness, but was a case where the deceased for his own convenience and out of a habit adopted for his convenience walked up the tracks and then across them. He had not even gotten on his overalls, and cannot be brought within the field of workman at the time of his death.

That there might be no uncertainty as to the testimony, and that it might more fully impress the jury, counsel for the plaintiff again put the matter in these questions. (Pages 79-80.) See grounds of appeal 5-6 and 7.

"Mr. Wescott: Now, there is one other question I want to ask this gentleman in relation to the duty of the railroad company to an employee of one of its contractors on or near its right of way.

"Q. What is the rule in Pennsylvania?

"Mr. Joseph Gaskill: We make the same objection as heretofore.

“The Court: Note the objection and an exception to it.

“A. That is laid down in the same case that I referred to.

“Q. The same case you referred to?

“A. Yes.

“The Court: Well, what is the rule?

“The Witness: The rule is that the railroad must exercise reasonable care under the circumstances, in view of the fact that the employee of the contractor has to work on or near the tracks.

“Mr. Joseph Gaskill: I move to strike out that answer if the Court please, as being irrelevant, immaterial and incompetent.

“The Court: The motion is overruled and an exception noted.

“Q. What is the legal presumption in Pennsylvania where a man has been crossing the tracks of the company or where a person is killed while crossing the tracks of the railroad company, with reference to his exercise of care?

“Mr. Joseph Gaskill: I make the same objection if the Court please, on the same grounds.

“The Court: The objection is overruled and an exception noted.

“A. When a man is crossing the track and has been killed, the presumption is that he has exercised all the care requisite under the circumstances, that is, that he has stopped, looked and listened, which is the summing up of the rule in Pennsylvania.”

The first question is as erroneous in matter of fact as that of the trial Judge, because it was not shown that Gibbs and Hill was a contractor of the company. Further, while the question omitted any reference to necessity, the witness took it as implied and therefore inserted the matter of necessity in his answer. The question as to the legal presumption in Pennsylvania of one killed while crossing tracks is equally improper because it involves the implication of the facts stated in the foregoing questions. Certainly there can be no presumption of innocence on the part of a trespasser while crossing the tracks of the company. It is our contention as stated in the colloquy with the trial Judge (page 85, line 18) that deceased was clearly a trespasser.

It is plainly admitted by the pleadings and by the testimony thereunder, that the rule as to trespassing exists as in our own state, because the pleadings and the proof have attempted to justify the act of Nugent in walking up the tracks and attempting to walk across them.

V.

We submit that the trial Judge erroneously and unlawfully refused to direct a verdict for the defendant. Tenth ground of appeal. See motion, page 119.

The defendant called the engineman and fireman of the train which killed Nugent, as well as the assistant foreman of track repair who was guarding the track repair gang at that point at the time of the accident. These men testified to the sounding of the signals and the failure of Nugent to hear or be governed by them. Also that he was not crossing over the railroad tracks at the time he was killed,

and that the freight train prevented him from doing so, as matter of fact, because it was partially ahead of the passenger train which struck him. That Nugent was actually walking up on the outside end of the ties of the track on which he was struck. Further that *it was entirely unnecessary* for Nugent or the other members of the gang to walk up the railroad tracks to get to the bridge, because there were steps at the Berwyn station leading to an overhead bridge, constructed for the convenience and safety of passengers. That on the other side, at the top of the embankment was a highway—Lancaster pike, which ran along the cut by and to the highway bridge the gang was constructing. This was not denied on rebuttal.

The foreman of track repair testified that he was watching for trains, and seeing these trains approach he whistled his men off the tracks while they passed, and that they tried to warn Nugent but he did not hear them and was struck by the train almost in their midst. The engineman and fireman testified that their train was not under power but was drifting at and under the bridge and from the bridge to the station. That Berwyn was a stop for that train and power had been cut off to make the station stop as well as to comply with instructions.

This testimony occupies only the twenty pages beginning with page 88. It is so brief, so positive, and so conclusively meets the extraordinary case of the plaintiff we would like the Court to read it in full.

We submit that this testimony cleared beyond all doubt the ambiguousness and uncertainties on which the plaintiff's legal premise was founded, and that any doubt which could have remained in the mind of the Court on the plaintiff's case as to the rights

of the plaintiff should have cleared away and that the motion to direct a verdict for the defendant should have been granted.

VI.

The trial Judge improperly charged the jury as follows: Eleventh ground of appeal. See page 122.

“There is testimony in the case that when an
“employee working lawfully on a railroad in
“the performance of his duties is required to
“be in a position of danger with respect to
“moving trains that there the railroad company
“owes him a duty of reasonable care to avoid
“injury to him; and it is claimed in this case
“on behalf of the plaintiff that there was adop-
“ted a custom or rule for the guidance of those
“in charge of the trains upon this occasion, that
“they should let their engines drift as they ap-
“proached this bridge. Various reasons have
“been given for that practice, and it further
“has been testified in the case that the deceased
“knew of this rule.

“I say, the defendant’s answer to all this is
“that there was no violation of any duty, and
“secondly, that the plaintiff heedlessly walked
“into this train without paying any regard to
“his own safety.”

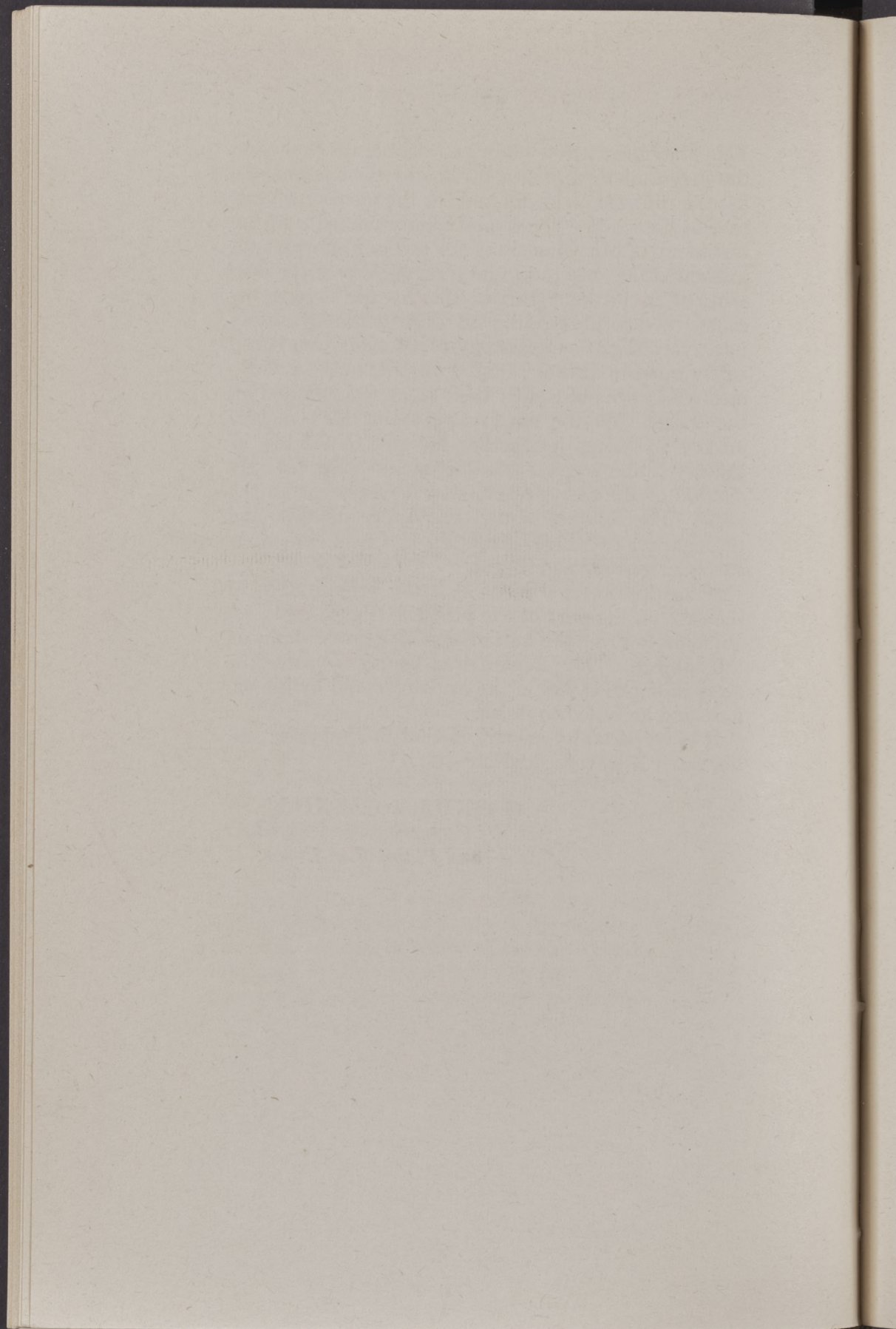
We submit that this charge was unlawfully and grossly prejudicial to the defendant’s cause. This statement assumed (contrary to the proofs) that Nugent was working lawfully on the railroad in the performance of his duties, and was required to be in a position of danger with respect to moving trains.

This statement was a plain and deliberate charge to the jury that Nugent *was invited* by the company to use the railroad as he did and for the purpose of getting to his work. The trial Judge assumed that the testimony of Mr. Oliensis of the law in Pennsylvania presented the case to the jury regardless of the doctrine of invitation. But in this he was wrong because a careful reading of that testimony shows positively that the testimony of Oliensis was based solely upon invitation; that it applied only to workmen who were obliged by their work to be in and on the tracks. We did not cross-examine Mr. Oliensis or try to bring out further facts as to the law of Pennsylvania because his testimony was entirely outside of the case presented and irrelevant to the issue. The reliance of the trial Judge upon it, and the charge, to which exception has been taken, is surely erroneous and illegal.

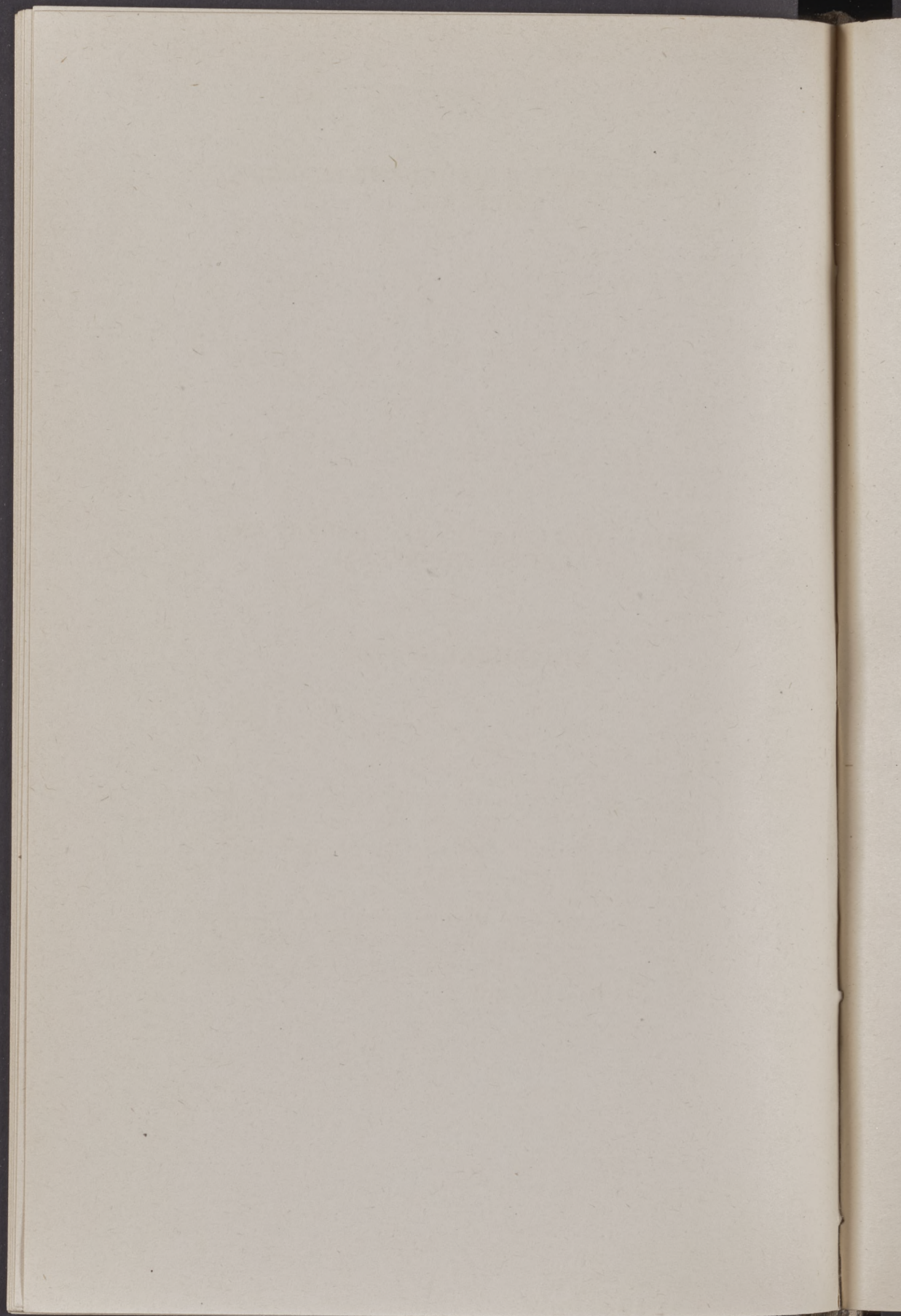
It has not seemed to us that the presentation of the case on the part of the plaintiff is such as to require us to brief the authorities in Pennsylvania on the subject. The plaintiff was bound to prove the facts in his case within the law presented by his expert and he failed to do so.

It is respectfully submitted that the judgment below must be reversed with costs.

GASKILL & GASKILL,
*Of Counsel with Defendant
and Plaintiff-in-Error.*







**NEW JERSEY COURT OF ERRORS AND
APPEALS.**

JOEL W. FITHIAN, Adminis-
trator of PHILIP NUGENT,
Deceased,

Plaintiff & Respondent,

vs.

PENNSYLVANIA RAILROAD
Co.,

Defendant & Appellant.

ACTION AT LAW.
ON APPEAL.

**BRIEF FOR PLAINTIFF-RESPONDENT AND
AGAINST THE APPEAL.**

STATEMENT OF FACTS.

The plaintiff in this suit is the administrator of Philip Nugent, deceased, who was killed April 6, 1915, as the result of being struck by an eastbound train of the defendant company at a point a short distance west of a certain station located on the main line tracks of the defendant company, running west from Philadelphia, known as Berwyn Station, and suit was brought to recover damages for Nugent's death thus caused by the defendant company. This case was tried before Judge Frank T. Lloyd and a jury, at the Camden Circuit and resulted in a verdict of \$5,000.00 for plaintiff.

Philip Nugent, the decedent, was, on April 6, 1915, in the employ of George Gibbs, and Ernest R. Hill, partners, trading as Gibbs and Hill, who were doing certain work for the defendant company in connection with the stringing of overhead wires from Broad Street Station in the city of Philadelphia, to a point at or near a certain station on their main lines of tracks running west from Philadelphia, known as Paoli Station.

On the above date, the gang of men in which Nugent was employed, were at work placing iron guards or screens upon an overhead wagon bridge crossing the tracks of the defendant company, a short distance west of Berwyn Station; these screens or guards being attached to the underneath part of the span of the bridge, and extending beyond the sides of the bridges. This gang of men had been engaged at this work at this point for a period of about two weeks before the happening of this accident.

A tool box in which this gang kept their tools and clothing had been placed upon the raised platform of the freight house at the Berwyn Station; this platform being on the northerly side of the tracks, or the side on which passengers would alight from trains traveling west from Philadelphia. The overhead wagon bridge spanned a deep cut through which ran the tracks of the defendant company. The bank of the cut on the north side of the tracks of the defendant company, or the same side on which the tool box was kept, was steep, offering no means of access to the wagon bridge. The bank of the cut on the opposite side of the defendant's tracks was less steep and there was a well-defined path beginning a short distance east of the base of the wagon bridge and leading up to the level of the floor of the bridge.

This gang of men, including decedent, Nugent,

while working upon this wagon bridge, came to their place of work by train, alighting at Berwyn Station, they would then first get their tools and overalls from the tool box, then proceed westwardly along the tracks of the defendant company to a short distance east of the wagon bridge, then cross same to the opposite side from which they had alighted, and gain access to the wagon bridge by the aforementioned path.

The materials used by this gang in their work had been unloaded from cars of the defendant company upon defendant's right of way, at the foot of the wagon bridge and on the north side of the right of way, the side opposite the foot path leading to the wagon bridge. The heavier pieces, comprising this material, were raised to the level of the wagon bridge by means of a rope and tackle. The lighter pieces were carried by the members of the gang across the tracks of the defendant company and up to the bridge by means of the aforementioned path. It was thus necessary for members of this gang to be upon defendant's tracks frequently during the prosecution of their work.

The defendant company had, prior to the date of this accident, issued an order to its train crews, ordering them during working hours, to drift (or to proceed without power applied), under those bridges upon which men were at work. The foreman of the gang in which Nugent was employed had informed the men, comprising this gang, in Nugent's presence, of this order given by the defendant company. After the issuing of this order, defendant company, through its servants, had observed the provisions thereof in the movement of its trains under this bridge.

On the morning of the accident, the decedent, Nu-

gent, alighted from a train reaching Berwyn Station about 7.50 o'clock. He proceeded to the tool box on the station platform from which he took a pair of overalls and then proceeded toward the wagon bridge by walking along the northerly side of the defendant's tracks until he reached a point something more than 100 yards distant from the wagon bridge. At this point, he stopped and looked in both directions along defendant's tracks, and then proceeded to cross the first two tracks on defendant's right of way (there being four tracks at this point); he then stopped and again looked towards the bridge, and then proceeded to cross the two remaining tracks. At the time defendant crossed these two remaining tracks, or tracks No. 3 and No. 4, there was a freight train on track No. 3, a considerable distance away from the decedent (on the other side of the wagon bridge), proceeding eastwardly at a slow rate of speed. The decedent was struck on track No. 4, by a passenger train, which, according to testimony of certain other members of the gang at work on the bridge, who observed Nugent's actions, and were cognizant of what was taking place on the tracks of defendant company proceeded eastwardly under the wagon bridge, and approached the spot at which Nugent was crossing, at a high rate of speed without giving any signal whatsoever of its approach, and contrary to the order issued, by the defendant company, in that the engine proceeded under power when passing under the bridge, and while so moving, struck and killed Nugent.

The testimony of certain of the defendant's witnesses, who testified as to the management of this passenger train, was in conflict with the testimony of plaintiff's witnesses as to this point.

This accident occurred after the usual time for the

gang to go to work and the other members of the gang, excepting Nugent, were upon the bridge, either at work or preparing to go to work.

The tracks of the defendant company curve sharply to the north or right after passing under the wagon bridge, thus making it impossible to see for a long distance down the tracks from a point east of the wagon bridge. The tracks of the defendant company run through a deep cut from the Berwyn Station to the wagon bridge, where the men were at work; the bank on the north side of this cut was considerably steeper than the bank on the south side and offered no means of access to the wagon bridge. There is a well-defined path leading from the tracks of the defendant company up the south bank of the cut to the wagon bridge.

ARGUMENT.

In paragraph 1 of brief of defendant and plaintiff-in-error or appellant, it is alleged that the proofs presented by the plaintiff-respondent at the trial of this case constituted a variance from the facts as alleged in paragraph 1 of plaintiff's complaint. ~~The~~ ^A variance is defined as follows: 39 *Cyc.* page 1122, "A disagreement between the allegations and the proof in some matter which, in point of law, is essential to the charge or claim; a substantial departure from the issue in the evidence adduced; and essential difference between the pleadings and the proof." The Courts in this state have apparently followed this definition, even under our old system of pleading. (*Mulford vs. Bonner*, 9 N. J. L. page 315.) Paragraph 1 of this complaint is as follows:

“That George Gibbs and Ernest R. Hill, partners, trading as Gibbs and Hill, were, on or about the 6th day of April, 1915, engaged in erecting for defendant, the Pennsylvania Railroad Company, at defendant’s request, certain overhead wiring for the conduct of electric current over and parallel with certain of the tracks of said defendant at or near the station of said defendant at Paoli, state of Pennsylvania.”

At the trial, before the presentation of plaintiff’s case, motion was made on behalf of plaintiff to amend this paragraph by inserting the word “Berwyn,” in place of the word “Paoli,” which amendment was consented to by defendant.

The first paragraph of defendant’s answer is as follows:

“It admits the matters stated in the first paragraph of the complaint.”

There being an admission of this point on the part of the defendant, no direct proof was presented at the trial on this point. Moreover, no testimony was presented at the trial from which even an inference might be drawn that Gibbs and Hill were engaged in constructing a highway bridge over the railroad tracks for the municipality as is argued by defendant. Plaintiff’s witness, Joseph Powers, on cross-examination, testified as follows (page 42):

“Q. Now, what was the actual part of the work that you were doing on the bridge at this time?

A. I was putting up screens.

Q. Putting up screens?

A. Yes.

Q. What do you mean by screens?

A. The screens to screen the wires that go over the bridge.

Q. I understood you to say screens; did you say strings?

A. No, screens.

Q. What kind of screens were those?

A. Wire screens, I guess, about six or eight, some of them big.

Q. What were they put up for?

A. Why, to keep anybody from getting tangled up with the wire.

Q. Had you laid the floor of the bridge?

A. The floor of the bridge?

Q. Yes.

A. Sure.

Q. That had been laid and these big girders that carry the bridge had been put in place?

A. *We wasn't doing any work on top of the bridge.*

Q. That is what I want to find out.

A. It was underneath we had to do our work.

Q. You were doing this work of putting up these screens underneath the bridge?

A. Yes, right over the end of the bridge.

Q. Did you have a scaffold hanging from the bridge?

A. Yes.

Q. You were working on scaffolds putting up screens under the bridge?

A. Yes, setting up brackets underneath the bridge; we didn't need any scaffold for the screens here; the brackets go underneath."

It is manifestly clear that the only person who had any thought in mind that this gang of men were at work actually constructing this bridge was the

attorney for the defendant, and it is further apparent that witness was endeavoring to explain that they were not constructing the bridge when he replied: "We wasn't doing any work on top of the bridge." And it is also clear that he was endeavoring to explain that this work was in connection with the overhead wiring being put in place for the defendant company. It must be borne in mind that this witness was an ignorant man, as is very clear from reading his testimony, and that he was not capable of making as clear explanations as would have been a more intelligent witness. The same condition exists with reference to the testimony of Thomas Doyle. In the examination of this witness by defendant's attorney (page 62), there is nothing to indicate to the witness that defendant's attorney was assuming or meant to assume, that this gang of men were actually at work constructing this bridge. It is plain that his questions could have referred just as well to the work upon which this gang was actually engaged, as to the work of actually constructing the bridge. The only instances in which there could possibly have been any reference to bridge construction, was where, in cross-examination, defendant's attorney put words into witnesses' mouths.

In the examination of plaintiff's witness, Jerald O'Brien, attorney of defendant did not, in any wise, question him as to the work that this gang of men was doing upon this bridge.

Attorneys for defendant-appellant, after specifically admitting that Gibbs and Hill and the men employed by them and of whom Nugent was one, were engaged in constructing overhead wiring for the defendant company, and not content with endeavoring to draw incorrect inferences from the testimony of plaintiff's witnesses, have gone entirely outside of

the record of this case to make the following statement: "Only a railroad company operated by electricity would install wires for carrying electric current along its tracks," apparently hoping that this Court will infer from this statement that defendant does not operate its trains at this point by means of electricity. It is, however, a well-known fact that this is not the case, but that defendant company does operate a large number of its trains at this point by means of electricity.

It is, therefore, apparent that the proofs as produced by plaintiff at the trial of this case, did not show a variance from the facts as set out in the first paragraph of plaintiff's complaint, and admitted in paragraph 1 of defendant's answer. Moreover, numerous facts were proven from which the natural inference follows that this work was being done for the Pennsylvania Railroad, such as the placing of the tool box in which this gang kept its tools, upon the station platform of the defendant company; the dumping of material for use upon this work upon defendant's right of way; permission by the defendant for the men belonging to this gang to walk along its right of way and to cross its tracks as necessity called.

Moreover, the appellant is not in a position at the present time to raise this point, as same was not set out as one of the grounds of appeal, nor was this point raised at the trial of the case. It is accordingly apparent that there is no merit in this contention made on behalf of the appellant.

Appellant further states in paragraph 1 of his brief:

"The complainant states that in the performance of his duties, Nugent and the other workmen, were necessarily required to frequently

cross over and walk along the tracks of the defendant, at or near the place of work. It was upon this bold allegation of fact that the case was tried and sent to the jury, although it was not proven to have been necessary on the part of the workmen, but merely a practice necessarily unlawful. Evidently counsel tried to make the actual facts establish a case according to the original or mistaken notion."

and argues this point in paragraph 2 of his brief.

At the trial of the case, plaintiff produced two photographs showing the stretch of tracks between Berwyn Station and the bridge on which the gang of men, of which the plaintiff's intestate formed one, were at work at the time of the happening of this accident. These pictures showed a deep cut running from the station to the bridge, the north side of which was more steep than the south side. Nothing was produced on behalf of the defendant to show that these pictures did not give a correct representation of these physical conditions. Plaintiff's witness, Joseph Powers, was asked on re-direct examination (page 50) the following questions:

"Q. Wait a second; there is one subject, if the Court please, I forgot to ask this witness about. When you people, the whole gang, went to work in the morning didn't you go by train?

A. Yes.

Q. And you got off at this station?

A. Yes.

Q. Where this tool box was?

A. Yes.

Q. And was there any other way to get to the bridge?

A. No, that is the only way we could go up

Q. Couldn't you get up on the right-hand side?

A. No, we would have to cross the fence, where the fences are in there, and we always used to walk up on the side of the road.

(On motion of defendant's attorney, the part of the following answer, which was a volunteer statement, was stricken out.)"

Plaintiff's witness, Thomas Doyle, upon his direct examination, testified as follows (page 54):

"Q. When you went there in the morning, where did you get off?

A. Got off on the north side of Berwyn.

Q. At the station?

A. Yes.

Q. Then how did you go?

A. Went up the railroad.

Q. Well, on the track?

A. No, no.

Q. How did you go?

A. Up in the pathway.

Q. The pathway?

A. Yes.

Q. On which side of the track?

A. On the north side.

Q. That is to say, on your right-hand side as you were walking toward the bridge?

A. On the right-hand side, yes.

Q. Is that correct?

A. That is correct.

Q. *Did you always have to go that way?*

A. Yes.

Q. Now, how far did you go before you crossed?

A. Went up to the abutments of the signal tower.

Q. Where were your materials as to that abutment of the signal tower—where were they kept, how close to that?

A. Oh, about a hundred yards.

Q. Nearer the bridge?

A. Yes.

Q. How did you get your materials across?

A. Had to take them across, across the tracks.

Q. And when you got across the track, how did you get up on the bridge?

A. Took them up the foot path.

Q. Is that the way you always went?

A. That is the way.

Q. *Was there any other way to go?*

A. *No other way to go.*”

On cross-examination, witness Doyle testified as follows (page 61):

“Q. Now, you say that during the weeks that you had been working on this bridge, you had taken the risks of walking backward and forward across these tracks?

A. Yes.

Q. When you could as easily have made paths, foot paths up both sides—is that so?

A. Well, the bank is too steep to get up.

Q. You mean to say that the bank over on this side is steeper than the bank on that side, do you?

A. Yes.

Q. And you mean to say that the bank over here on the right side is steeper than the bank on that side?

A. Yes.

Q. And that because the bank on the left side was so steep that you made no pathway up there to the top?

A. On the right side, we made no pathway.

Q. Yes, on the right side you made no path?

A. No.

Q. And you made no pathway up there simply because it was steep?

A. Yes."

Defendant produced no testimony to contradict the statements of these witnesses to the effect that the north bank was too steep to form a means of access to the bridge. Defendant contented itself with the proof that there was a round-about means of gaining access to this bridge from the station, by means of some other bridge and wagon road. It is very significant, however, that defendant did not show that this was a practical means as well as a possible means of access to the bridge in question. From the above quoted testimony, it is clear that the plaintiff did produce proof of the fact that Nugent and the other workmen were necessarily required to frequently cross over and walk along the tracks of the defendant, at or near the place of work. The testimony of defendant's witnesses as to another possible means of gaining access to the wagon bridge, clearly raised a jury question as to this point, which was properly submitted to the jury.

It was, however, unnecessary for plaintiff to show that this was the only means of access to the bridge in order to charge the defendant with duty of exercising reasonable care towards plaintiff's decedent. It is alleged and admitted in the pleadings and borne out by the proofs, that the work in question on which this gang was engaged was being done for the defendant company; that this work had been going on at this particular point for a period of two weeks before the happening of this accident; that

during all that time this gang of men gained access to the bridge by going down defendant's right of way, crossing its tracks and climbing to the floor level of the bridge by means of a path up the south embankment of the cut through which ran defendant's right of way; that defendant dumped material for use on this work on the right-hand, or north of the right of way; that this material was carried across the tracks and up the path in question to the bridge. This user of the defendant's tracks and right of way for this length of time, was sufficient to put defendant upon notice thereof and its failure to object thereto was sufficient to found a presumption of acquiescence in such user, and to constitute these men, including plaintiff's intestate, as being lawfully upon defendant's tracks.

The decided cases in this state have held that a person upon the property of another under circumstances similar to those presented in this case is lawfully upon such premises, and is not a trespasser or a mere licensee. It therefore follows that the defendant company owed to Nugent, under the circumstances, all the duties which it would owe to a person rightly and lawfully upon its right of way—the giving of adequate warning to him of the approach of trains passing along the tracks at that place.

In *Phillips vs. Library Co.*, 55 N. J. L. page 307, this Honorable Court cites with approval the doctrine laid down in *Holmes vs. N. E. Ry. Co.*, L. R. 4 Exch. 254, as follows (page 314):

“The learned Judge then held that the fact that the plaintiff was upon the premises for the transaction of business ‘prevents the case from being one of a mere licensee.’ Cleasby, B., said: ‘The question of mere license does not arise;

for, as soon as you introduce the element of business, which has its exigencies and its necessities, all idea of mere voluntariness vanishes,' ”

and then goes on to state the rule governing this class of cases, as follows:

“* * * * Indeed, it is impracticable to lay down any precise rule, in set terms, which shall embrace all the cases within and exclude all the cases without the range of an owner’s liability for such injuries. The utmost that can be done is to state in general terms the controlling principle that the liability of an owner or occupier for the condition of the premises arises where the plaintiff was induced to make the use of the premises, in the course of which he sustained the injury sued for, by express invitation, or by invitation to be implied from acts and conduct of the defendants. The gist of the liability consists in the fact that the person injured did not act merely on motives of his own, to which no act or sign of the owner or occupier contributed, but that he entered the premises because he was led by the acts or conduct of the owner or occupier to believe that the premises were intended to be used in the manner in which he used them, and that such use was not only acquiesced in, but was in accordance with the intention or design for which the way or place was adapted and prepared or allowed to be used.”

Authority to use defendant’s right of way in such a manner as it was used by the employees of Gibbs and Hill, at this point, may have been given in two ways, either by an actual formal granting of this privilege or by the acquiescence in such a user. Either

manner of giving consent is equally binding upon the owner of property. As above quoted, in the case of *Phillips vs. Library Co.*, 55 N. J. L. page 307, the Court held:

“The gist of the liability consists in the fact that the person injured did not act merely on motives of his own, to which no act or sign of the owner or occupier contributed, but that he entered the premises because he was led by the acts or conduct of the owner or occupier to believe that the premises were intended to be used in the manner in which he used them, and that such was not only acquiesced in, but was in accordance with the intention or design for which the way or place was adapted and prepared or allowed to be used.”

In this case, there were certainly acts on the part of the defendant which would indicate that its right of way was at least allowed to be used for the purpose to which it was put by these men in question—reference is made to the acts of the defendant in allowing the tool box to be placed upon the station platform, the dumping of materials upon its right of way at the base of the wagon bridge, and the continued use of defendant's right of way by ~~them~~ *these* men for something over two weeks without protest on defendant's part. It is, therefore, clear, as above stated, that these men in question, including plaintiff's intestate, were lawfully upon defendant's right of way, and that the defendant-appellant owed to these men, including Nugent, the duty of exercising reasonable care in the movement of its trains at this point.

In paragraph 3 of appellant's brief, reference is made to testimony produced on behalf of the plain-

tiff-respondent with respect to the operation and movements of trains on the tracks of the defendant company under this bridge and in its vicinity, and set out in the first, second and third grounds of appeal and forming the basis for a motion for non-suit and withdrawal of a juror.

This testimony produced on plaintiff's behalf, was in effect that the boss of the gang in which plaintiff's decedent was working, had informed the men constituting this gang, in Nugent's presence, that the railroad company had issued an order directing all trains to drift during working hours, under the bridges on which men were at work. The trial Judge admitted this testimony upon the statement of plaintiff's attorney that this would be followed up by testimony showing that the defendant company observed this order or rule in the operation of its trains under the wagon bridge in question. The plaintiff fulfilled this promise as will be seen from the following testimony. Plaintiff's witness, Joseph Powers, in his direct examination, testified as follows (page 28) :

“Q. Now, after you got these instructions and began to work, did the trains or not drift under that bridge?

A. Well, they used to drift.

Q. They used to drift?

A. Yes, pretty near all of them used to drift through.”

Plaintiff's witness, Thomas Doyle, in his direct examination, testified as follows (page 60) :

“Q. And did they drift through?

A. Yes.”

Moreover, this testimony produced by the plaintiff

was corroborated by the testimony of two of the defendant's witnesses, William S. McFadden, the engineman of the train which struck and killed Nugent, and Christopher C. Breitagan, the fireman of this train.

McFadden testified as follows (page 93):

“Q. You knew there was danger connected with and arising out of the situation there?

A. Yes.

Q. And you had been instructed to drift, hadn't you?

A. Yes, sir.

* * * * *

Q. Pardon me one second; the reason you were told to drift was that you knew these men were under this bridge there and they wanted a chance to escape suffocation or being hit, didn't they?

A. Yes.

Q. And that is the reason you drifted and went under slowly, to give them plenty of chance to escape?

A. Yes.”

Breitagan testified as follows (page 111):

“Q. Now, one other question and I will be through. You knew that this was a place of danger with these men working on that bridge, didn't you?

A. Yes.

Q. And that was the reason you were instructed to drift when you came there?

A. Yes.

Q. How fast will that train go when it is drifting?

A. That depends on the speed you are run-

ning when you shut off. That is down grade there.

Q. Then you were not instructed to slow down, just to drift?

A. In approaching a point of that kind,—I can't recall how the orders was written in that case—we were to beware of men working on the scaffolds under that bridge and not use steam while under the bridge. That is due to—you may suffocate a man; he may be overcome with the gas, may drop down on the track, that is the cause of that."

It is therefore submitted that no error was committed in the admission of this testimony objected to by defendant.

In view of the foregoing quoted testimony, of defendant's witness, McFadden, we submit that the attorneys for defendant have misstated this testimony when they say in paragraph 3 of their brief, "It appeared from the testimony of the engineer and fireman of the train which killed Nugent, that the orders actually given them for operating under that bridge, were that they were to beware of men working on scaffolds under that bridge and not to use steam to avoid suffocating the men or causing them to be overcome with gas." As a matter of fact, the engineer who was called as a witness by the defendant, and who is therefore bound by his testimony, stated in substance that the reason for the giving of this order was that these men under the bridge might have a chance to escape suffocation *or being hit*; that the reason for drifting at that point was to give them plenty of chance to escape.

It is therefore apparent that the witness Breitagan, was the only one who limited the reason for the

giving of this order to the prevention of suffocating the men at work. We submit, therefore, that the testimony of both witnesses, McFadden and Breitagan, corroborate the testimony of plaintiff's witnesses, as to the existence of such a rule, and fasten same beyond a doubt upon the defendant company. Moreover, the testimony of McFadden, who was called by the defendant, and whose testimony is therefore binding upon it, fully corroborates the theory of the plaintiff that this rule was given for the purpose of offering protection to the man at work at this point, from being hit by passing trains.

As a part of paragraph 3 of its brief, appellant states that the trial Judge refused the motion of non-suit "promising to deal with that fact by cautioning the jury in his charge" ("that fact," relating to connecting the railroad company with the rule as to operation of trains). This is not a correct statement of what was said by the trial Judge, as will be seen from reading his statement on page 87, which is as follows:

"Well, if it becomes a question where later on I should conclude that it had not been traced, I will then deal with it by cautioning the jury not to pay heed to it, but my present impression is that where the company operates its trains in conformity with such rule, an apparent rule, that it is some evidence to go to the jury as to its existence."

In his charge to the jury, the trial Judge said (page 122);

"There is testimony in the case that when an employee working lawfully on a railroad in the performance of his duties is required to be in a position of danger with respect to moving

trains, that there the railroad company owes him a duty of reasonable care to avoid injury to him; and it is claimed in this case on behalf of the plaintiff that there was adopted a custom or rule for the guidance of those in charge of the trains upon this occasion, that they should let their engines drift as they approached this bridge. Various reasons have been given for that practice, and it further has been testified in the case that the deceased knew of this rule."

It is manifest, in view of the testimony of both the engineman and the fireman, both of whom were witnesses called by the defendant, and who gave differing reasons as above set out for the making of this rule, that the above-quoted statement of the trial Judge in his charge to the jury was an entirely correct statement of the testimony produced before him. Further, that he did not in any wise alter this statement when, upon objection made to this part of his charge by the attorney of defendant when he stated to the jury (page 126)

"Well, gentlemen, you must recollect the testimony, that statement was in substance made by the witness, that the rule was given so that the men would not be smothered or disturbed, endangered, by the exhaust or smoke when the engines went under the bridge."

This statement being made in reply to the statement made by the attorney of the defendant, that the fireman Breitagan, was the only witness who explained the rule; moreover, from a reading of the testimony it is manifestly clear that this was an incorrect statement of the existing facts.

There was accordingly no error committed by the

trial Judge in the admission of the testimony set out in grounds of appeal No. 1, 2 and 3, or in his charge to the jury as above quoted. Moreover, it was entirely proper that this testimony be admitted in view of the fact that one of the grounds of defense set forth in defendant's answer, was that of contributory negligence on the part of plaintiff's intestate. In order for the Court or jury to determine whether or not this decedent exercised that degree of care imposed upon him by law, it is necessary to have produced in evidence all facts and conditions surrounding the accident. The fact that the company had issued an order as above testified to, and that the defendant had acted in accordance therewith in the movement of its trains, and that the decedent, Nugent, knew of this order, and of defendant's compliance therewith, were very important facts in connection with the actions of Nugent, when crossing defendant's tracks on the morning of the accident, therefore if the trial Judge had refused to admit this testimony in evidence, he would have committed a very grave error.

In the *Central Railroad Company vs. Moore*, 24 Law, page 824, the Court said (page 831):

"In *Beers vs. the Housatonic R. R. Co.*, 19 Conn. Rep. 566, a case well considered and correctly decided, Storrs, J., having considered the numerous and apparently conflicting authorities on the subject, has expressed the true rule. 'There having been,' he remarks, 'negligence on the part of the defendants, it was not sufficient for them, in order to excuse themselves, to show merely that there was a want of care on the part of the plaintiff, unless it was a want of such a degree of care as it was incumbent on the plain-

tiff to exercise.' * * * * The rational rule, and the one, as we think, established by the best authorities in reference to the case, incumbent on the plaintiff, is, that it be ordinary care, as it is termed, which (as stated by Ld. Denman, Chief Justice, in *Lynch vs. Nurdin*, 1. Adol. & Ellis 36 N. S., interpreting that phrase as used by Ld. Ellenborough in *Butterfield vs. Forrester*, 11 East [60]) means, 'that *degree of care which may reasonably be expected from a person in his situation*, and is synonymous with reasonable care.' * * * * Reasonable care requires that in all cases, the precaution should be proportioned to the probable danger of injury, and the question as to the exercise of such care, is to be determined like all other questions of fact."

New Jersey Express Co. vs. Nichols, 33 N. J. L., page 434, (pages 440 and 441):

"Negligence is a relative term, depending upon the circumstances under which the injury was received, and the obligation which rests on the party injured to care for his personal safety. * * * * The defendant's wagon was on the sidewalk in violation of a city ordinance, and contrary to law. There was ample space between the wagon where it stopped and the platform to permit the plaintiff to pass in safety. He had a right to assume that the wagon had been stopped to allow him and his friend to pass, as was the duty of the driver, and was guilty of no negligence in making the effort."

Penna. R. R. Co., vs. Righter, 42 N. J. L., page 170 (on page 184):

“The question of the presence or absence of negligence must be largely dependent upon the circumstances surrounding each case. The test is that absence of such caution as a person of ordinary prudence would exercise under the circumstances.”

It is submitted that the trial Judge's refusal to allow defendant's motion for non-suit was entirely proper. Analyzing the plaintiff's case; it is seen that the following facts were proven: in the pleadings, it is admitted that Gibbs and Hill, the employers of Nugent, were subcontractors of the defendant company, and the testimony of plaintiff's witnesses bears out this statement and admission; that in going to and from the tool box in which this gang of men kept their tools and clothing, and in the actual conduct of their work, it was necessary for them, including Nugent, to cross defendant's tracks at a point near the wagon bridge, on which these men were working; that these men, including Nugent, had been at work at this particular place for a period of from two to three weeks prior to the happening of the accident; that the men comprising this gang and including Nugent, were necessarily upon defendant's right of way, by reason of the physical conditions surrounding their place of work and the nature of their work; that the defendant company had issued an order or rule ordering all trains to drift under the wagon bridge in question during working hours; that Nugent knew of the issuing of this order; that subsequent to its issue, the defendant's servants obeyed the terms thereof in the movement of trains at this point; that Nugent, on the morning of the accident, proceeded to work in the customary and only possible way; that, before

crossing the tracks of the defendant company, he did what was required of him by the Pennsylvania rule, in that he stopped, looked and listened; and that the curve in the road and the presence of a moving train prevented his seeing the onrushing train that struck and killed him; that defendant company, through its servants, operated the train, which struck and killed Nugent, in a negligent manner, in that it failed both to observe the rule made by the company for the movement of trains at this point, and that knowing that this was a place of danger from the presence of workmen at that point, it failed to give any warning of the approach of the train in question. Had the train drifted, as plaintiff correctly supposed it would, he would have had time to cross in safety for the reason that a drifting train could not have covered the distance between the plaintiff and the point where the coming train was concealed from his view. It is clear that the plaintiff's proofs presented a *prima facie* case and accordingly a refusal to grant defendant's motion for non-suit was entirely proper. Moreover, it was entirely proper for the Judge to refuse to non-suit the plaintiff on the ground that Nugent had assumed the risks incident to his employment, and that death came by one of the risks which he assumed. The Court said in *D'Agostino vs. Penna. Rd. Co.*, 72 N. J. L., page 358 (on page 360),

“Where a workman in the discharge of his duty has placed himself in a position of probable danger, and where he has a right to expect a warning before the danger becomes actual, and he is injured because no warning was given, the question whether he assumed the risk or was guilty of contributory negligence cannot be decided by the Court.”

In *Durand vs. N. Y. & L. B. R. R. Co.*, 65 N. J. L., page 656, this Court said, on page 657,

“That an employee assumes the ordinary risks incident to his employment, and also risks consequent upon special dangers known to him, or which he could have discovered by the use of due care. * * * * I do not find it in any authority stated to be the rule of law that the employee or servant of a railroad company is bound to a higher than ordinary degree of care in informing himself of defects in appliances used on railroads for signals or warnings of danger; his duty therein is to use ordinary care, and whether or not he has used such degree of care is for the jury to settle.”

It is clear that Nugent had the right to expect that the defendant company would obey the rule laid down by it for movement of trains at this point, and that it would give signal of the approach of its trains at this point of danger. It therefore cannot be said, in view of the doctrine laid down in the above decided cases, that Nugent assumed as part of the risk of his movement, the risk that defendant would conduct its trains in a negligent manner at this point. The Court's action therefore in refusing to grant a non-suit on the ground of the assumption of risk by Nugent, was entirely proper and in accordance with the rule laid down in the decided cases. Moreover, the question of contributory negligence on Nugent's part was one of fact for the jury to determine.

In paragraph 4 of defendant-appellant's brief, in dealing with the testimony of plaintiff's witness, Oliensis, who was called to prove the law in Pennsylvania, upon certain points relating to the case in

question, this statement is made, "The question was repeated to the witness and he answered it (see page 73) giving the rule as to railroad crossings and as to permissible crossings, *i. e.*, ones which by the lapse of time and usage of the public have become permissibly recognized as a crossing."

The attorney of defendant did not cross-examine this witness on this answer nor did he produce any testimony to show that defendant's answer was of the nature so alleged. It is therefore clear that in making this statement defendant-appellant's attorney has gone entirely outside of the record and has indulged in an entirely improper line of argument. Defendant had ample opportunity to prove that this testimony was an incorrect statement of the Pennsylvania law or rule if he believed such to be the case. He, however, did not take advantage of this opportunity but bases his argument upon an assumption without there being anything in the record to support same. In this same paragraph of defendant-appellant's brief, certain testimony of plaintiff's witness, Oliensis, is quoted and the allegation made that these questions and answers were improper and illegal because the question is full of statements that are not proved to be facts in the case, and then goes on to specify the unproven facts to be "The workmen of Gibbs and Hill were not working on or about the railroad. They were working on the construction of a highway bridge over the railroad. Moreover, there is no proof that in the performance of their duties, they were called upon, that is, required or compelled to cross the tracks."

In the first of these so-called unproven facts, defendant's attorney again refers to his peculiar and unwarranted theory as to the work which Gibbs and Hill were doing at this point. This phase of the case

has already been taken up, and we believe it has been clearly demonstrated that there is no merit in the position taken by defendant.

In the second so-called unproven fact "There is no proof that in the performance of their duties, they were called upon, that is, required or compelled to cross the tracks," defendant's attorney has completely ignored the testimony of plaintiff's witness and in place thereof, has set up a theory of his own invention. The Court's attention is respectfully called to the following testimony produced by witness called on behalf of the plaintiff, Joseph Powers, (page 51):

"Q. And was there any other way to get to the bridge?

A. No, that is the only way we could go up —

Q. Couldn't you get up on the right-hand side?

A. No, we would have to cross the fence, where the fences are in there, and we always used to walk up on the side of the road."

Thomas Doyle (page 55):

"Q. Is that the way you always went?

A. That is the way.

Q. Was there any other way to go?

A. No other way to go."

Jerald O'Brien (page 65):

"Q. How did you get the material to the bridge?

A. Well, we used to take the iron we were working with on our shoulder.

Q. And then you would go where?

A. We would go across to the left-hand side and walk up on the bridge with it.

Q. Go up a path.

A. Yes, a foot path.

Q. Was that the only foot path there?

A. On that side, yes."

From the above-quoted testimony, it is apparent that it was clearly shown that the men comprising this gang, including Nugent, were all working on the tracks of defendant and doing work which required their presence close to and upon the tracks, and that Nugent had in the course of his employment, occasion to cross the tracks of the defendant company. It, therefore, follows that the facts mentioned in the questions put to this witness, were facts as brought out by the testimony of plaintiff's witness. That accordingly, the question quoted in defendant's brief as objectionable was an entirely proper question based upon proven facts, and therefore properly admitted by the trial Judge.

It is further submitted on behalf of plaintiff that the theory on which defendant bases its objection to the testimony of plaintiff's witness Oliensis, is an entirely incorrect one. The law of a foreign state is a question of fact for determination by the jury. This witness was called to prove the law of Pennsylvania as to certain points. Nothing was produced by defendant to discredit his testimony; therefore, his testimony must be received as a true statement of the Pennsylvania law on these various points. The question as to whether or not the workmen of Gibbs and Hill were working on or about the railroad and as to whether or not they were required or compelled to cross the tracks of defendant's company, are also facts for the determination of the jury. If the jury should find that a state of facts exists which would not bring this case within the rule or law of Pennsyl-

vania, as testified to, then, of course, such rule would not be binding upon them in determining this case. It is thus manifest that under our theory of the proof of law of a foreign state, it is entirely proper to introduce the rule of law on certain points, even though that rule may involve disputed questions of fact, as the determination of what is the law of a foreign state and what are the facts involved are both jury questions.

The question as to whether or not Nugent was a trespasser on the tracks of defendant company and which is again raised in paragraph 4 of defendant-appellant's brief, has already been discussed, and need not be taken up at this point.

In paragraph 5 of the brief of defendant-appellant, there is discussed the refusal of the trial Judge to direct a verdict for defendant, which is alleged to be an error as set out in the 10th ground of appeal. In arguing this point, defendant bases its contended right to such a direction upon the testimony of the engineman and fireman of the train which killed Nugent, and the assistant foreman of track repair.

The plaintiff produced three witnesses who testified as to the movements of Nugent prior to the accident, and also of the movement of the train of the defendant company, which killed Nugent, prior to the happening of the accident. In substance the testimony of the plaintiff's witnesses is that before Nugent started across the tracks he stopped and looked both up and down the tracks, after crossing two such tracks he again stopped and looked and then proceeded to cross the remaining tracks. That the train which struck Nugent was operated in a manner contrary to the rule governing the movement of trains at this point, and that it gave no signal whatsoever of its approach up to the time it struck and

killed Nugent. In substance, the testimony of defendant's witness on this point is that the train in question obeyed the aforesaid rule, in that it did drift under the wagon bridge in question, and that it gave a signal of its approach by the ringing of the bell on the engine. That at the time Nugent was struck he was not in the act of crossing the tracks, but was walking up the fourth track towards the bridge, in the opposite direction from which the passenger train was proceeding. From this testimony, it is manifestly clear that a jury question was raised both as to whether or not defendant was conducting the movement of its train at the time of the accident in a negligent manner, and also as to whether or not Nugent was guilty of contributory negligence.

Central Railroad Co. vs. Moore, 24 Law, page 831:

“Whether negligence or want of reasonable care is to be determined by the Court or by the jury is a question which has been discussed. In *Doorman vs. Jenkins*, 2 Adol. and Ellis, 256, the Judges all concur in saying that no general rule could be laid down. That in some cases, the negligence depended entirely upon the law, and then it was for the Court; in others it depended upon facts or inferences from facts, and then it was a case for the jury.”

defendant's ~~plaintiff's~~ brief that he would have both this Court and the Court below to consider merely the testimony of defendant's witness and to ignore the testimony of plaintiff's witnesses. It is only upon a theory of this kind, which is manifestly improper, that he has any grounds on which to insist on a direction for a verdict for defendant.

Paragraph 6 of defendant-appellant's brief deals with a certain portion of the charge of the trial Judge which defendant alleges to be improper and prejudicial to his cause. This portion of the trial Judge's charge referred to, is as follows (page 122):

"There is testimony in the case that when an employee working lawfully on a railroad in the performance of his duties is required to be in a position of danger with respect to moving trains, that there the railroad company owes him a duty of reasonable care to avoid injury to him; and it is claimed in this case on behalf of the plaintiff that there was adopted a custom or rule for the guidance of those in charge of the trains upon this occasion, that they should let their engines drift as they approached this bridge. Various reasons have been given for that practice, and it further has been testified in the case that the deceased knew of this rule.

"I say, the defendant's answer to all this is that there was no violation of any duty; and secondly that the plaintiff heedlessly walked into this train without paying any regard to his own safety."

In reading the entire charge of the trial Judge, one cannot help but be impressed with the clear and accurate statement of fact made by him and the great care with which he charged the jury on each particular point. The apparent ground of objection of the above-quoted charge of the trial Judge, seems to be that the trial Judge made an assumption contrary to the proofs and that he, in substance, charged the jury that plaintiff was working lawfully on the railroad in the performance of his duties; that the above statement was a plain and deliberate charge to the

jury that Nugent was invited by the company to use the railroad as he did for the purpose of getting to his work.

We submit, that in so arguing, defendant is endeavoring to read into the Court's charge something which is both not there and which the trial Judge had no intention of charging. It is manifest that his statement regarding the testimony of witness Oliensis, who was the only witness produced to prove the law of the state of Pennsylvania, was a correct statement of this testimony. Moreover, the trial Judge properly called to the attention of the jury the testimony as to the law of the state of Pennsylvania, in that it was the function of the jury to determine what was the law of the state of Pennsylvania from the proofs produced at the trial.

Title Guaranty & Trust Co. vs. Trenton Potteries Co., 56 N. J. E. page 441;

Coryell vs. Buffalo Union Furnace Co., 26 Atlantic Reporter, page 55.

It is clear that the trial Judge left to the jury to decide as to whether or not Nugent was unlawfully upon the tracks of the defendant company, as will be seen by that portion of his charge appearing at the top of page 123:

“If the death of the deceased man was due alone to the negligence of the defendant company in the failure to exercise reasonable care toward him, if that be the rule in Pennsylvania, while he was lawfully using the tracks in the course of his employment, then, of course, a liability attaches in that event.”

This being the case, it is manifest that that portion of the charge of the trial Judge objected to by de-

pendant was entirely correct and proper. It is therefore submitted that in view of the fact that there was no error committed at the trial of this cause, either in the admission of testimony, refusal to non-suit, or to direct a verdict, or in the charge by the Court to the jury, that the judgment below must be affirmed with costs.

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